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ABSTRACT

This monograph summarizes methods used to investigate and prevent crime in school, sketches possible legal claims that students might make as a result of these approaches to inschool crime prevention, and, in an extensive analysis of five court cases, gives particular attention to the legal issues related to searches of student lockers by school law enforcement authorities. (Author)

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Legal Aspects of Crime Investigation in the Public Schools

William G. Buss

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William G. Buss

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FOREWORD

This monograph by William G. Buss is one of a series of state-of-the-knowledge papers* dealing with the general topic of student control and student rights in the public schools. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

Mr. Buss surveys the methods used to investigate and prevent crime in school, and examines some of the possible legal claims that students might make in objection to those methods. In an extensive analysis of five court cases, he gives particular attention to the legal issues related to searches of student lockers by school law enforcement authorities.

Mr. Buss is a professor of law at the University of Iowa, where he teaches educational law, constitutional law, and labor law. He received his bachelor's degree with honors from Yale College in 1955 and his law degree with honors from Harvard Law School in 1960.

From 1964 to 1967 Mr. Buss was a lecturer on education and assistant to the dean of the Graduate School of Education at Harvard University. He has been at the University of Iowa since 1967. His most recent publication is an article, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," published in the *University of Pennsylvania Law Review*, February 1971.

PHILIP K. PIELE, *Director*
ERIC Clearinghouse
on Educational Management

JOHN PHILLIP LINN, *Past-president*
National Organization on Legal
Problems of Education

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*The other four papers are: (1) *Legal Aspects of Control of Student Activities by Public School Authorities*, by E. Edmund Reutter, Jr., Professor of Education, Columbia University; (2) *Rights and Freedoms of Public School Students*, by Dale Gaddy, Director, Microform Project, American Association of Junior Colleges, Washington, D.C.; (3) *Suspension and Expulsion of Public School Students*, by Robert E. Phay, Associate Professor of Public Law and Government, University of North Carolina; and (4) *Legal Aspects of Student Records*, by Henry E. Butler, Jr., Professor of Educational Administration, University of Arizona.

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Besides processing documents and journal articles, the Clearinghouse has another major function—information analysis and synthesis. The Clearinghouse prepares bibliographies, literature reviews, state-of-the-knowledge papers, and other interpretive research studies on topics in its educational area.

NOLPE

The National Organization on Legal Problems of Education (NOLPE) was organized in 1954 to provide an avenue for the study of school law problems. NOLPE does not take official positions on any policy questions, does not lobby either for or against any position on school law questions, nor does it attempt in other ways to influence the direction of legislative policy with respect to public education. Rather it is a forum through which individuals interested in school law can study the legal issues involved in the operation of schools.

The membership of NOLPE represents a wide variety of viewpoints—school board attorneys, professors of educational administration, professors of law, state officials, local school administrators, and executives and legal counsel for a wide variety of education-related organizations.

Other publications of NOLPE include the NOLPE SCHOOL LAW REPORTER, NOLPE NOTES, and the NOLPE SCHOOL LAW JOURNAL.

National Organization on Legal Problems of Education
825 Western Avenue
Topeka, Kansas 66606

LEGAL ASPECTS OF CRIME INVESTIGATION IN THE PUBLIC SCHOOLS

By William Buss

I. INTRODUCTION

On the first day of school in January 1970 in the Washington, D.C., public schools, a fifteen-year-old junior high school student was shot and killed by another student.[1] At least three other incidents involving guns occurred in Washington's junior high schools on the same day.[2] In February 1970 the *New York Times* reported on the heroin "epidemic" in New York City's public schools. According to the newspaper report, heroin is used and pushed in many junior high schools and in virtually every high school in the city. Students, former students, and truants comprise the bulk of the pushers as well as the users.[3] There is no reason to assume that these problems of drugs and violence in public schools are isolated in either time or location.[4] Recent studies by Dr. Stephen K. Bailey of Syracuse University,[5] by Dr. Alan F. Westin of Columbia University,[6] and by the House Subcommittee on General Education[7] indicate that disruption in high schools is widespread and often serious. One news story reported that in the nation's schools between 1964 and 1968 student assaults on teachers increased from 25 to 1,801, student assaults on students from 1,601 to 4,267, and expulsions of "incorrigible" students from 4,884 to 8,190.[8]

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1. Washington Post, Jan. 6, 1970, at 1, col. 1.
2. *Id.*
3. N. Y. Times, Feb. 16, 1970, at 1, col. 1.
4. *See, e.g.*, Cleveland Plain Dealer, Feb. 26, 1971, Feb. 27, 1971, Mar. 9, 1971, Mar. 30, 1971 (reporting on homicide committed by four students on a fifth student in Cleveland public school); *The Heroin Plague: What Can Be Done?*, Newsweek, July 5, 1971, at 27-32.
5. The study was done by the Policy Institute of the Syracuse University Research Corporation under Dr. Bailey's direction and was published as Disruption in Urban Public Secondary Schools, (National Association of Secondary School Principals, 1970) [hereinafter cited as the Syracuse Study].
6. Dr. Westin is Director of the Center for Research and Education in American Liberties at Columbia University. His study was reported briefly in the Syracuse Study at p. 7.
7. *See* 116 Cong. Rec. E-1178-80 (daily ed. Feb. 23, 1970). The study, conducted by the General Education Subcommittee of the Committee on Education and Labor of the House of Representatives, is hereinafter cited as the House Subcommittee Study.
8. National Catholic Reporter, Jan. 28, 1970, at 1, col. 4, reporting on separate studies conducted by Senator Thomas S. Dodd and by the United States Office of Education. *See also* N. Y. Times, Feb. 9, at 1, col. 4; 94 Time, Nov. 14, 1969, at 49; 64 U. S. News and World Report, May 20, 1968, at 36-38.

These and similar reports portray a very ugly picture of American schools at the beginning of a new decade. The factual basis of the reports did not, of course, suddenly emerge in 1970. The reality they suggest and the breeding ground of that reality have no doubt existed for some time. But public awareness of the chaos and disorder in schools has recently become much more acute, accompanied by a widespread belief that the criminal dimension of life in public schools has never been so pervasive and that it is growing.

At the very least, reports of crime and disruption in school elicit a powerful emotional response. Accompanying that response is an insistence on crime investigation and prevention in the schools. Clearly, law enforcement in public schools is a reality in the 1970s.

Consistent with my belief of what has actually taken place, I view the investigation and prevention of crime in public schools quite broadly. As I use it here, the concept includes any law enforcement activities that center in and about the school building. These activities may be designed to prevent the committing of crime and delinquency[9] inside the school or on the school grounds, or they may be designed more generally to ferret out crime or to deter students from engaging in delinquent behavior anywhere.

Despite this inclusive view of the topic, certain approaches to the prevention of crime in school are not considered here. For example, various aspects of public education have been criticized for contributing to delinquency;[10] it would be quite reasonable to treat the problem of school-related crime by making fundamental changes in the schools to eliminate such causes. Indeed, it is quite possible that all other approaches will, in the end, amount to mere palliatives, and not very effective ones at that. Accordingly, a quite different but equally far-reaching solution may suggest itself. If crime in school is seen to be a problem of truly overwhelming proportions, much of the problem could be eliminated by eliminating school, or perhaps moderated by ending compulsory attendance.[11]

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9. Throughout this paper, "crime" and "delinquency" are used interchangeably.

10. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, (1967) 69-74, especially the separate report of the Task Force, JUVENILE DELINQUENCY AND YOUTH CRIME," 223, 228-58; SYRACUSE STUDY, 26-33. *See also* H. JAMES, CHILDREN IN TROUBLE: A NATIONAL SCANDAL, ch. 16 (David McKay Co., 1970); Moore, *The Schools and the Problems of Delinquency*, 7 CRIME AND DELINQUENCY 201 (1961).

11. For the suggestion that compulsory attendance should be eliminated or substantially changed, *see* E. Banfield, NEW YORK, Feb. 23, 1970, at 32; L. Cunningham, *Hey, Man, You Our Principal*, PHI DELTA KAPPAN, Nov. 1969, at 123, 128; G. DENNISON, THE LIVES OF CHILDREN 88 (1969); J. HOLT, THE UNDERACHIEVING SCHOOL 28 (1969); G. LEONARD, EDUCATION AND ECSTASY 102 (1968).

Important as it may be to consider such radical solutions, they are beyond the scope of this paper.

It is essential to acknowledge at the outset that very little is known about any of the basic ingredients: the nature and extent of "inschool" crime; the effect of this crime on the educational process and on the individuals engaged in education; the effectiveness of various preventive steps; and the possibly disadvantageous side effects of such steps. Of course, we now have a substantial amount of information about delinquency, broadly speaking,[12] and a start in examining various aspects of disruption in schools.[13] Nevertheless, despite a growing body of facts such as those recited at the outset of this paper, we still know astonishingly little about the crime and delinquency that take place within school or directly affect members of the school community.

According to the conventional wisdom, inschool crimes are to be expected primarily if not exclusively in large, urban school systems.[14] But much uncertainty lies beneath this conventional wisdom and the newsworthy evidence available thus far. Are crimes of violence (mainly assault)[15] characteristic of *all* big-city systems? Are such crimes absent, practically speaking, from all other than big-city systems? If more crimes are committed in big-city school systems than in rural and suburban systems (or, for that matter, if there are substantial differences among systems of any one type), what accounts for the difference? Is it related to the nonschool crime rate? Is it related to per-pupil expenditures? Is it related to the number of school-age children in the school district who attend parochial or other private schools? Is it related to socio-economic or racial composition of the student body?[16] Is it related to the part of the country in which the school is located? Is it related to the school program, to teacher-student relations generally, or to other student grievances?[17] Finally, is it related to anything

12. *See* TASK FORCE report, note 10 *supra.*

13. *See* studies cited in notes 5-7 *supra.*

14. According to the Syracuse Study, disruption correlates more highly with large student bodies than with large school systems. *See id.* at 10, 59 Table 11. *See also* note 18 *infra.*

15. In addition, substantial numbers of other major felonies have been reported—homicide, forcible rape, robbery, burglary, and larceny. *See* National Catholic Reporter, note 8 *supra.*

16. Both the Syracuse Study (at 12, 56-59 Tables 8-10, 60 Table 12) and the House Subcommittee Study (at E-1178-80) related disruption to ethnic factors.

17. *See* Goldman, *A Socio-Psychological Study of School Vandalism*, 7 CRIME AND DELINQUENCY 221 (1961), for a study of the relationship in a single school system between damage to school property and various school, teacher, and student factors. The figures collected by the House Education Subcommittee related disruptions to seven named issues of which disciplinary rules and dress codes were the most frequently named. *See* House Subcommittee Study, 116 CONG. REC. E-1178 (daily ed. Feb. 23, 1970).

being done to prevent crime either within or outside the schools? These same questions can also be asked about apparently significant differences in the amount of crime among various schools in the same school system. Incidentally, how big is "big" anyhow? Or how urban is "urban"?[18]

Although it is widely accepted that violations of criminal laws regulating the possession and disposition of drugs are not confined to large cities or big urban school systems,[19] questions comparable to those above can be asked about differences in the extent of the violations (or the drugs involved) and the reasons for such differences.

When attention is shifted from descriptive facts about school-related crime to the actual *effect* of crime on the educational process and, beyond that, to the effect of various preventive efforts, uncertainty increases even more. The philosopher's touchstone is not needed to appreciate what it feels like to be hit on the head or spied upon by a fellow student. But the indirect effects of such incidents are much more unfathomable. To what extent do they threaten or affect the behavior of other students? Do they make learning more difficult or even impossible for some students? Do they create an aura of fear or anxiety that brings the educational process to a stop or seriously undermines it? If so, at what level of crime or crime prevention does such an educational breakdown occur?

The difficulty in answering questions such as these and, in many instances, the total absence of information for answering them merely point up the obvious gap between recognizing that a school-crime problem exists and developing an intelligent crime-prevention program. Any reasonable response to the problem of crime in school should be carefully tailored to the particular circumstances at each school. A certain level of knowledge is indispensable to make anything approaching a reasonable assessment of the costs and benefits of alternative courses of action. Meanwhile, it is clear that action has been and will be taken on the basis of whatever

18. To concentrate only on "urban" schools, the Syracuse Study chose all public schools with a post-office address (according to the mailing list of the National Association of Secondary School Principals) in a city having a population of 50,000 or more. Table 11 related disruption to student bodies of three different sizes, less than 1,000, 1,000 to 1,999, 2,000 or more. Syracuse Study at 59.

19. *See* Rotenberg & Sawyer, *Marijuana in the Houston High Schools—A First Report*, 6 HOUSTON L. REV. 759, 777 (1969) [hereinafter cited as Rotenberg & Sayer]; "First Tuesday" N.B.C. Television (drugs in Omaha, Nebraska), (1970); *The Heroin Plague: What Can Be Done?* NEWSWEEK, July 5, 1971, at 27-32. The Rotenberg & Sayer article is by far the best I have found on the details of a crime-prevention program, in this case limited to marijuana violations.

facts are known or assumed, and according to the emotions that those facts arouse.

Inevitably, any action taken to prevent crime in school will have consequences. A student or teacher or other member of the school community may be touched by such action in numerous ways—physically, psychologically, economically, educationally—and these various effects may sometimes find expression in legal claims asserted by an affected individual.

In this paper I will examine some of the possible legal implications that certain inschool approaches to investigation and prevention of crime have for students. Concentration on student interests does not mean that teachers and others are unaffected by attempts to deal with school-related crime. It does suggest that the student's interests are the main concern of public education and that many of the critical considerations of crime prevention in school can best be drawn out by examining the problem from the point of view of the student who may feel sufficiently aggravated to seek legal relief.

Although my inquiry stresses the student's potential clash with crime-prevention methods, I do not wish to suggest that all such methods are wrong or unlawful or that the legal interests asserted by the student will be upheld by the courts. I assume that the various approaches to law enforcement in the public schools will often be popular and will tend to please more students—and especially their parents and the community at large—than they antagonize.[20] It would, of course, be unfortunate if a mood of hysteria, for or against crime prevention, is permitted to dictate choices of action. At the present time, I see no reason to be unduly concerned that those student interests in conflict with crime-prevention methods will be overemphasized.

In the next section I will summarize some of the methods that have been used to investigate and prevent crime in school. I will then sketch out in a very broad, suggestive, and tentative fashion some of the possible legal claims that might result from these approaches to inschool crime prevention. In a final section I will deal more exhaustively with the legal problems related to searches of student lockers by school and law enforcement authorities—one crime-prevention method that has been sufficiently developed in

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20. For example, the Tucson, Arizona, police-in-schools program, despite much pointed criticism, has had the necessary support to continue. *See* note 21 *infra*.

litigation to lend itself to more thorough exploration of the student's legal position.

II. SAMPLER OF CRIME-PREVENTION METHODS

The general kinds of crime-prevention methods and their variations described here are derived from methods reported to have been actually used in the schools. I make no representation that the list is exhaustive.

Presence of Law Enforcement Officers

Since much of the current polarization in society has occurred around the police, comparably strong and antagonistic positions are likely to accompany any use of law enforcement officers in school for crime prevention.[21] Nevertheless, it seems useful to distinguish the uses and abuses that may or may not exist in particular circumstances. The policeman may appear in school in uniform or in plain clothes.[22] He may carry a gun or other weapons, or he may not.[23] He may be at the school constantly, intermittently, or only occasionally.[24] He may come inside the building or merely stay nearby.[25] He may appear alone or with other officers.[26] Of course, he may be "good" or "bad" as a man or at his job.[27] He may or may not be discreet and sensitive to the school situation. His purpose in being at the school may be to maintain order after violence has arisen,[28] to deter threatened violence, to investigate a

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21. Tucson, Arizona, perhaps furnishes the most notable example to date. Begun in 1963, the program has been under attack from the Southern Chapter of the Arizona Civil Liberties Union and others since the beginning, but it has thus far endured. *See* Shepard & James, AMERICAN EDUCATION (Sept. 1967) at 2-4; The Christian Century, July 13, 1966 at 879 (editorial); Robinson, PHI DELTA KAPPAN (Feb. 1967) at 278-80; Stocker, SCHOOL MANAGEMENT (May 1968) at 46-50.

22. See Stocker, SCHOOL MANAGEMENT (May 1968) at 46-50 (Tucson: no uniform); Robinson, PHI DELTA KAPPAN (Feb. 1967) at 278-80 (Flint, Mich.: uniform). The policeman may also appear in disguise. *Cf. Big Man on Campus: Police Undercover Agent*, New York Times, (Mar. 29, 1971) at 1, col. 5.

23. Stocker, *supra* note 22 (Tucson: carries gun); Robinson, *supra* note 22 (Flint: carries gun and hand cuff); The Denver Post, Jan. 14, 1970 at 10 (Baltimore: carries blackjack but not gun) (Detroit: "security people" unarmed).

24. The Christian Century, Jul. 13, 1966, (Tucson: regular office); Robinson, *supra* note 22 (Flint: once a week).

25. The Denver Post, *supra* note 23 (Chicago: many outside, a few inside).

26. I have found no examples of stationing more than one policeman in a school except for temporary emergencies.

27. Virtually every program proclaims the quality of the men selected. *See, e.g.*, Pitchess, CTA J., Jan. 1969, at 30 (Los Angeles). It does not seem a wise tactic for the opponents of this method to challenge such assertions.

28. According to the House Subcommittee Study, the police were called as a result of protests in 24 percent of the cases reported. *See* House Subcommittee Study, at E-1178.

particular crime,[29] or to detect and head off incipient delinquency.[30] Finally, the law enforcement officer at school may be a regular policeman, a civilian specially hired for the inschool assignment, or even a teacher or other school employee specially assigned to the policing function.[31]

Surveillance and Informing

As used here *surveillance and informing* refers to any of a wide variety of intelligence systems used in school to learn about crime and those actually or potentially believed to be involved in it.[32] Such intelligence operations might include observing, listening, collecting, and possibly disseminating information. The method can also include direct interrogation.[33] These functions might be carried out by the police, by the school authorities, by both together, or by someone hired for this specific purpose. Even students have been engaged to spy and inform on their fellow students.[34] In other cases the police might gather information from various school records made available to them by school authorities.[35] The police

29. *See* cases discussed *infra*, in notes 85-236.

30. Together with the closely related purpose of establishing a favorable police image, the early detection of delinquency seems to be the most common purpose. *See, e.g.*, NATION'S SCHOOLS (April 1968), at 58-59 (Edina, Minnesota).

31. *See* Malvesta & Ronayne, TODAY'S EDUCATION (Dec. 1967), at 71 (Quincy, Mass.: police work as teacher aides); Pettibone, OHIO SCHOOLS (May 1966), at 12-16 (Columbus, Ohio: teachers serve as juvenile court probation officers); The Denver Post, Jan. 14, 1970, at 10 (Philadelphia: unarmed "non-teaching assistants" patrol corridors). Of course, teachers and school administrators sometimes perform police functions without being specially designated. *See* text at notes 149-151.

32. Any use of police in schools for early detection of crime necessarily involves some form of surveillance and informing. *See* note 30 *supra*. *cf.* the use of an alarm system to prevent vandalism. TODAY'S EDUCATION (Dec. 1968), at 28.

33. One of the more serious charges against the Tucson program concerned the open-ended freedom of the police officers in school to question children at will, without notice to or presence of parent, teacher, or any adult. Eventually, this freedom was somewhat restricted and the presence of an adult at questioning required. *See* The Christian Century, July 13, 1966, at 879; Stocker, SCHOOL MANAGEMENT (May 1968), at 46-50. *See also* Rotenberg & Sayer, 783 (confessions sought by school administrators). *See* discussion of the *Gault* decision in text at notes 49-51.

34. *See* Rotenberg & Sayer, at 765-66, 778-80. *See also* Moore v. The Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) (two students were present with college dean and police officers in planning dormitory search for marijuana); *In re* Donaldson, 269 Cal., App. 2d 509, 75 Cal. Rptr. 220 (1969) (student informed principal of drug violations and purchased "speed" from another student at principal's direction); *In re* G., 11 Cal. App. 3d 1193. 90 Cal. Rptr. 361 (1970) (dean informed by "classmate" who had seen student defendant take pill and appear intoxicated); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970) (dean told that student defendant had "stuff on him" by "student informer").

35. *See* Letter of Nov. 4, 1969, on file with author, from Southern Chapter of Arizona Civil Liberties Union to Police Chief pointing out that school rule permitted sharing confidential records. See *generally* Ware, LAW OF GUIDANCE AND COUNSELING (The W. H. Anderson Co. 1964) 78-82; RUSSELL SAGE FOUNDATION, GUIDELINES FOR THE COLLECTION, MAINTENANCE AND DISSEMINATION OF PUPIL RECORDS (1970); NATIONAL EDUCATION ASSOCIATION SPECIAL TASK FORCE, PROPOSED CODE OF STUDENT RIGHTS AND RESPONSIBILITIES 6-12 (1970).

might also obtain information by talking to teachers, counselors, or other professional education personnel.[36] The information collected might have been obtained initially from the student by the school guidance counselor or psychologist, or by the law enforcement officer himself acting in the dual capacity of counselor and policeman.[37] The information collected could be narrowly limited to evidence about a particular crime; it could concern potential criminal activity in general; or it could extend broadly to every facet of the student's private life.[38]

Education and Propaganda

Under *education and propaganda* I include any method of crime prevention designed to make students favorably disposed to law, order, and the police.[39] At its most innocuous level, this method might involve simply a police officer coming to school for a lecture or a short movie depicting the police officer as a friend. At the other extreme, police and school authorities might use propaganda as a kind of psychological substitute for drugs[40] to induce a state of manageable docility in the students. In between, education and propaganda can include such methods as formal meetings at which crime and delinquency problems are discussed; formal counseling and advising of students by policemen, teachers, or professional counselors; informal discussions in and around school by police officers or educators; and the mere presence of a policeman selected and trained to make a favorable impression.

Use of Weapons

Weapons may be used in the school to prevent crime in at least two ways.[41] First, they may be actually used—clubs swung, guns shot, tear gas discharged—to stop a crime or attempted crime in progress or to apprehend a person discovered committing a crime.

36. *See* Rotenberg & Sayer, 782.

37. The Tucson program is claimed to involve both police-counselor cooperation and police acting as counselors. *See* The Christian Century Jul. 13, 1966, at 879; Robinson, PHI DELTA KAPPAN, (Feb. 1967), at 278-80.

38. *See* The Christian Century, Jul. 13, 1966, at 879.

39. A central purpose of many of the programs involving police in schools is to present the officer as a friend, "big brother," and the like. Rationales for these programs are frequently expressed in such terms as shaping the lives of students, forming favorable attitudes, teaching respect for authority, and changing the image of a cop. *See* Pitchess, TODAY'S EDUCATION, (Feb. 1969), at 81-82; Pitchess, CTA J., (Jan. 1969), at 30; NATION'S SCHOOLS, (April 1968), at 60-61; Malvesta & Ronayne, TODAY'S EDUCATION (Dec. 1967), at 71.

40. Compare DISCIPLINARY PRINCIPLES AND BEHAVIOR CHANGING DRUGS, INEQUALITY IN EDUCATION, No. 8, pp. 2-10 (Harvard Center for Law and Education).

41. *See generally* The Denver Post, Jan. 14, 1970, at 10; National Catholic Reporter, *Supra* note 8.

Second, weapons may have a deterrent effect. The mere fact of their known presence may deter a person from committing a crime. Weapons may be used or possessed by regular or special police officers, or by teachers, school administrators, or other persons engaged by a school system to function primarily in an educational capacity. In some cases, teachers or other professional educators evidently have been motivated to carry guns or other weapons for self-protection.[42] The presence of these weapons, if known, would possibly also have a deterrent effect and presumably a deterrent purpose as well.

Searches

Any student or other person suspected of possessing a dangerous weapon or evidence of a crime may be searched. Similarly, the student's locker, desk, or other space assigned to him may be searched. In either instance, the search may be conducted with or without a warrant and on the basis of various kinds and degrees of prior evidence leading the searcher to focus suspicion on the student. Again, the search might be made by regular or special policemen or by educational employees. The legal aspects of searches are considered more thoroughly in Chapter 3.

Discipline

School discipline might be regarded as a crime-prevention method in two ways. First, discipline might be considered to have a deterrent value both in the general sense of inculcating the values and practices of orderliness and peacefulness and in the particular sense of keeping children in line, with hall passes and the like, so there is no opportunity for criminal behavior. Second, disciplinary sanctions are sometimes used to punish students when they get into trouble with the law, even though they are not convicted.[43] The most obvious example is suspension or expulsion of the student to remove him entirely from the school.[44]

Although the line between discipline and law enforcement is blurred, I believe the two can be delineated at least for convenience

42. *See Id.*

43. *See* Rotenberg & Sayer, at 770 (Discipline of student based on charge or arrest rather than conviction).

44. *See* Abbott, *Due Process and Secondary School Dismissals*, 20 CASE-W. RES. L. REV. 378 (1969); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 *U.* PA. L. REV. 545 (1971); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Developments—Academic Freedom, 81 HARV. L. REV. 1045 (1968); Note, 72 YALE L. J. 1362 (1963). *See generally* Van Alstyne, *A Suggested Seminar in Student Rights*, 21 J. LEGAL ED., (1969), at 547, 551-55, for a collection of relevant authorities.

of discussion, and I do not intend to deal with discipline as such in this paper.

III. SKETCH PAD ON POSSIBLE LEGAL CLAIMS

Although any of the various crime-prevention methods outlined in the previous section may operate beneficially or at least harmlessly, each of them is also capable of abuse. Therefore, it is possible that a student might be injured—or believe he is injured—by the operation of any of them. There is very little settled law to provide guidance for the student who feels he is being harmed. Nevertheless, certain legal claims might be made under state and federal law.

State Claims

Most state constitutions have provisions protecting fundamental rights such as expression, association, and equality under law. The considerations involved in making a claim under such state constitutional provisions are substantially similar to those involved under the parallel provisions of the United States Constitution as outlined in the following section. In theory at least, the state claim would be potentially stronger because of the absence of any need to tailor the student's interest to a federal system. According to this view, a state court might recognize a novel right as applicable to a single state whereas a federal court might be hesitant to adopt the same legal principle for the entire country. On the other hand, it is arguable that the federal courts have more experience in applying constitutional law, are more sensitive to rapidly developing concepts governing civil liberties, and therefore would be more receptive to a student's claim that his individual rights have been invaded.

A state claim may also arise from an almost unlimited variety of general and specific provisions in the state's education laws. For example, every state assigns responsibility for public education to some state or local agency. If police are placed in the school not at the initiative of the responsible educational agency, or are permitted to operate within school without guidance from that agency, a suit might be brought to compel the agency to carry out its responsibility or even to remove the members of that agency for their failure to do so.[45] As a narrow illustration, the use of police offi-

45. *See* L. Peterson, R. Rossmiller & M. Volz, The Law and Public School Operation § 9.13 (Harper & Row 1968).

cers in a counseling capacity (or permitting them to perform counseling-like functions) might be challenged as a violation of the state's certification requirements for school counselors.

Other state claims might be based on common-law principles such as false imprisonment[46] (for an arrest of a student improperly made or for too severe curtailment of a student's movements by surveillance) or trespass[47] (for police invasion of a student's property interest in a locker or desk or automobile).[48]

Federal Claims

Under the United States Constitution a student might allege that crime-prevention methods used in public schools adversely affect his interest as a citizen or as a student. The starting point for analyzing a student's citizen claim is provided by the Supreme Court's decision in *In re Gault*.[49] In that case the Court rejected the state's argument that the child was entitled to custody rather than liberty, and held that a juvenile delinquency proceeding must provide certain specified constitutional protections. Under certain circumstances, some of the procedural safeguards required by *Gault* would apply directly to crime prevention in the schools. For example, it would seem reasonably clear that a child taken into custody in school would be entitled to the right to counsel, the right to remain silent, and the right to be advised of each of these rights.[50] These rights would clearly come into effect at the time a student was formally arrested in school by a police officer. But because a student is compelled by law to attend school and is under considerable physical restraint in school, it would seem that custody-related rights should come into operation as soon as a student is made the focus of investigation by the police or any school official,[51] concerning any criminal violation.

Apart from the specific rights that would apply to the student as a result of the *Gault* case, *Gault* stands for the fundamental proposition that children are not disqualified from enjoying constitutional protections because they are children. In *Tinker v. Des*

46. *See* 1 F. HARPER & F. JAMES, TORTS 224-31 (Little, Brown, and Co. 1956); W. PROSSER, TORTS 54-61 (3d ed. West 1964).

47. *See* 1 HARPER & JAMES, *supra* note 46, at 94, 104, 136-42; PROSSER, *supra* note 46, at 75-98.

48. Of course, such common-law actions must contend with the defense of immunity afforded public officers engaged in the performance of their duty. *See* 2 HARPER & JAMES, *supra* note 46, at 1632-46; PROSSER, *supra* note 46, at 1013-19.

49. 387 U.S. 1 (1967).

50. *Id.* at 34-57.

51. *But see* People v. Stewart, 63 Misc. 2d 601, 603, 313 N.Y.S. 2d 253, 256 (Crim. Ct. 1970) (dictum).

Moines Independent School District,[52] the Supreme Court also clearly established the related proposition that a child does not lose constitutional protection when he enters school. Holding unconstitutional a school regulation that prohibited students from wearing black armbands, the Court said that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[53] I assume that other basic constitutional rights make their way through the schoolhouse gate, though concededly all are subject to appropriate limitations growing out of the conditions of school. Drawing on these two Supreme Court decisions and on many recent cases[54] that have applied and extended their supporting principles, a student may claim that his rights as a citizen to freedom of speech, freedom of association, and privacy are infringed by certain methods used in school to prevent crime.

Besides these citizen claims, the student may assert his constitutional right as a student to an equal share of the education offered by the state. At least since *Brown v. Board of Education*,[55] equal educational opportunity has hovered near the point of recognition as a preferred constitutional interest.[56] In any event, there is little doubt that the equal protection clause of the Fourteenth Amendment limits the state's allocation of educational benefits and that a child's strong interest in obtaining educational opportunity in equal measure with other students will be sympathetically viewed by the courts.

I will discuss each type of claim in the sections following.

Citizen Claims—Privacy, Expression, Association

The ingredients of what I have labeled a citizen action are an identification of the interest claimed to be affected (privacy, ex-

52. 393 U.S. 503 (1969); *see* Note, 83 HARV. L. REV. 60, 154 (1969).

53. *Id.* at 506.

54. *See, e.g.*, Scoville v. Bd. of Educ., 425 F.2d 10, (7th Cir. 1970); Brooks v. Auburn, 296 F. Supp. 188 (M.D. Ala. 1969); Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wisc. 1968); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert denied*, 368 U.S. 930 (1961). The *Dixon* case, antedating both *Gault* and *Tinker*, is *the* landmark case for student rights. *See generally* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 552-59 (1971).

55. 347 U.S. 483 (1954).

56. *See* Cohen, *Defining Racial Equality in Education*, 16 U.C.L.A. L. REV. 255 (1969); Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969); Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564 (1965); Horowitz, *Unseparate But Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. REV. 1147 (1966); Developments—Equal Protection, 82 HARV. L. REV. 1065, 1129 (1969). *See also* OFFICE OF EDUCATION, U.S. DEPT. OF HEALTH, EDUCATION & WELFARE, EQUAL EDUCATIONAL OPPORTUNITY (OE-38001, 1966); Special Issue, *Equal Educational Opportunity*, 38 HARV. EDUCATIONAL REV. 3-175 (Winter 1968).

pression, or association), an infringement of that interest, and the absence of a sufficient justification for that infringement. In simple outline the student might argue as follows: (1) School attendance under compulsion of law is a serious restriction of liberty, encompassing both a general limitation on the freedom of movement and choice that he (or his parents) would otherwise have and concomitant specific limitations on his privacy, freedom of expression, and freedom of association. (2) Conceding at least for argument's sake that these restrictions are justified by the state's interest in having educated citizens,[57] the state may not increase these restrictions except as reasonably necessary in carrying out the educational mission. (3) The particular method of crime prevention that has been introduced into the school (for example, the stationing of uniformed policemen in the building) is not reasonably necessary. The defendant (probably the local board of education) might resist this line of argument at any of the three points outlined though it seems to me that only the third step in the argument is debatable.[58] The board of education is likely to say that the method attacked is in fact reasonably necessary. Thus, the issue would be joined.

The outcome would hinge on the facts shown and the inferences drawn concerning the justification for using the particular crime-prevention method and its effect on the particular interest asserted. These determinations will, in turn, depend heavily on the court's attitude toward the educational agency's discretionary power. Generally, courts are extremely reluctant to second-guess educational decisions. But a judicial inclination to defer to an educational judgment may be somewhat offset by the nature of the student's claim. If the student is asserting interests that the court recognizes as protected by the First Amendment, the court will not permit infringement of those interests in the absence of a *compelling* state interest.[59] Ordinarily, this would lead the court to examine not only

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57. *See* State v. Hoyt, 84 N.H. 38, 146 A. 170 (1929); Stephens v. Bongart, 15 N.J. Misc. 80, 189 A. 131 (1937); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950); A. STEINHILBER, STATE LAW ON COMPULSORY ATTENDANCE (1966).

58. Under the seond step, there is room to argue for some verbal formula other than "reasonably necessary." The main alternatives would probably be something like "*reasonably believed* that the particular method was necessary" or "believed in *good faith*" that it was necessary. Although these different modes of expression do matter, the main point is that inschool programs must be justified by their *educational* intent or effect. That seems to me beyond challenge, however difficult it may be to spell out and apply the standards for making the connection.

59. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960). Although the right of privacy is presumably not a First Amendment right, it would probably nevertheless receive the protection afforded by a more rigorous standard of review. *See* Griswold v. Connecticut,

the state's general interest (crime prevention) but also the interest of the state in achieving the general goal by the particular means chosen (as in the above example, stationing police in schools equipped and instructed to function in a specified way). The test invites the court to look for other means to achieve the same ends with less injury to the First Amendment interests.

Some specific illustrations should help to clarify this general approach. Suppose a student claims that a system of surveillance and informing interferes with his right of privacy. Everywhere he goes in school, the student argues, he is in danger of being watched or overheard. School is a public place, he admits, but it need not be and should not be so public that there is no corner of repose, no assurance of confidential conversation. An important part of school takes place outside the classroom,[60] and that part is effectively destroyed by the existence of an intelligence system that may utilize students or teachers as well as policemen. The student's success in arguing his case would depend primarily on his ability to show actual facts in support of his allegations. He would have to be able to demonstrate, for example, the actual involvement of fellow students, the recording of information, the number of "spies" employed, and the volume of data obtained. Although the constitutional right of privacy has thus far received only scanty application by the courts,[61] there is no reason to doubt its existence or to question the possibility of its application to a case such as this. The student would base his claim to privacy not only on his "right to be let alone,"[62] but on his interests in having relationships with his fellow students that require a certain kind and quantity of privacy to flourish.[63] Furthermore, the educational goals of the school are significantly built on these personal relationships.[64] Therefore, in-

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381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Richards v. Thurston, 424 F.2d 1281, 1285-86 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969); Sims v. Colfax Community School Dist., 307 F. Supp. 485, 488 (S.D. Iowa 1970).

60. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 512 (1969); Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); Hobson v. Hansen, 269 F. Supp. 401, 504 (D.D.C. 1967).

61. *See* Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

62. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

63. *See* Fried, *Privacy*, 77 YALE L.J. 475, 477, 485, 490 (1968).

64. The invasion of privacy would seem to be especially aggravated if information is obtained from the school counselor or from counseling records. Although the testimonial privilege is not generally extended to counselors and psychologists, the need for the privilege plainly exists and student communications made pursuant to counseling are ordinarily assumed to be confidential by the student as well as the counselor. *See generally* 8 WIGMORE, EVIDENCE 2285 (McNaughton ed. 1961); Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609 (1964); Note, 56 IOWA L. REV., Issue No. 5 (June 1971); authorities cited note 35 *supra*. Where the school policeman doubles as counselor (see note 37 *supra*), the danger of abuse seems

vasion of the student's privacy through a system of surveillance and informing undermines the educational process at the same time that it frustrates the student's interest in developing relationships with his fellow students.

The student might also claim that the system of surveillance and informing infringes on his freedoms of speech and association. According to this argument, the omnipresent eyes and ears of informers, known and unknown, have a "chilling effect" on his freedom to say what he wants and to associate with whom he pleases. Using an argument essentially like this, the plaintiffs in *Anderson v. Sills*[65] asked for a declaratory judgment and an injunction against a statewide police intelligence system aimed at potential troublemakers. This relief was granted by the lower court but was subsequently reversed on appeal. In the opinion favorable to plaintiffs, the court relied mainly on the overbreadth of the scheme and the availability of less drastic alternatives to achieve the purpose of preventing violence. In reversing this decision, the New Jersey Supreme Court emphasized that none of the plaintiffs had alleged injury to themselves and that it was inappropriate to decide the case on a motion for summary judgment on the basis of the abstract record presented. In dictum, the court was pointedly unsympathetic to restrictions on the investigative work of the police. Still, the theory of the plaintiff's case was not repudiated. What is remarkable is not the reversal (even by a unanimous New Jersey Supreme Court), but that even one judge would have recognized the plaintiffs' claim in the highly abstract form that was offered.

The public school student would seem to have a stronger case than the *Anderson* plaintiffs. Because his captivity in school makes him an easier target of surveillance, his fear of saying the wrong thing to the wrong person is likely to be more complete than it would be if the police had a wider area to cover. The power of the police (or educators performing comparable functions) to exploit the compulsory education system by recruiting fellow students as informers makes the chilling effect still deeper.[66] Of course, as the

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very great. *See generally* United States v. White, 401 U.S. 745, (1971); United States v. Hoffa, 385 U.S. 293 (1966); Massiah v. United States, 377 U.S. 201 (1964); LIPPIE, *The Student in Court* in STUDENT PROTEST AND THE LAW (Institute of Continuing Legal Education 1969).

65. 56 N. J. 210, 265 A.2d 678 (1970), *reversing* 106 N. J. Supp. 545, 256 A.2d 298 (Chancery 1969), 83 HARV. L. REV. 935 (1970).

66. A comment on the lower court's opinion in the *Anderson* case suggested that the chilling effect of a system of police surveillance has four components: (1) the knowledge of the system's existence by those subjected to it, (2) the nature of the information gathered, (3) the method of gathering the information, (4) the probable future use of the information gathered. 83 HARV. L. REV., *supra* note 65, at 938. The greatest possible

ultimate fate of the *Anderson* case makes clear, much will depend on the extent to which the complaining student can make out a concrete case of injury to himself.

It is often difficult to distinguish between association and speech interests since they tend to be affected—"chilled"—by the same forces. Sometimes, however, a particular surveillance system may tend to affect one or the other element more directly. For example, if the information collected especially concerns organizations to which a student belongs and the other students with whom he spends his time, the chilling effect on the student's freedom of association would be particularly marked.

Similar claims based on the student's interest in privacy, speech, or association could also be addressed to other methods of crime prevention, such as the presence of police or the use of weapons. The chilling effect of these methods on speech and association is less obvious, however, and would probably be more difficult to prove. With respect to the presence of policemen at the school, it might be argued either that policemen undoubtedly engage in surveillance, however informal or discreet, or that the mere presence of police officers is inhibiting.[67] Of course, if policemen are regularly present it is clear that an "association" not ordinarily related to school is forced on the student and that the student experiences a reduction of privacy.

It would be more difficult for a student to argue that interference with his First Amendment rights results from the presence of a dangerous weapon at school. The student would have to claim the existence of an implicit threat that the weapon would be used if he were to make disfavored associational choices or to express himself in a disfavored fashion. Such claims seem farfetched if one perceives the threat as direct and overt. But the implicit threat is likely to operate subtly and indirectly. Use of dangerous weapons (and, indeed, employment of most law enforcement techniques) is highly discretionary. The essence of the student's claim is that, in the borderline areas where discretion is critical,[68] students with ac-

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suppression of free expression would result if the students knew of the surveillance; if the information extended broadly to various aspects of what the students said in and out of class; if the information was gathered secretly by unknown teachers, students, crossing guards, and counselors; and if the information was divulged to employers, colleges, friends, parents, police, and other government officials.

67. *Cf.* Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) (constant police surveillance of book store enjoined on First Amendment grounds). *See generally* Note, 60 YALE L.J. 1091 (1951).

68. *See, e.g.,* Feld, *Police Violence and Protest,* 55 MINN. L. REV. 731, 735 (1971).

ceptable opinions and associations will get the benefit of the doubt and those with unpopular views and friends will not. Furthermore, if the weapon involved is only capable of causing minor harm or pain, the implicit threat may be credible even in a fairly direct sense. After all, the police night stick is not *that* different from the more conventional school paddle or rattan, and there is a good deal of recent history strongly suggesting that the police will use clubs (and even guns) on young people and may do so more readily if the young people represent antagonistic political positions.

Use of certain kinds of education and propaganda might also be challenged by the student as an invasion of privacy. Although he may concede that it is appropriate to teach *about* the police or about crime, he might argue that the school cannot simply turn over what is taught in this area to law enforcement agencies and must take some responsiblity for providing a reasonable balance of information. Still more persistently, he might argue that the school and police authorities have no right to attempt to manipulate his attitude about law enforcement or crime. The quintessence of privacy is the interior regions of the mind: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[69] The difficulty in such a case would lie in satisfactorily distinguishing legitimate "education" from forbidden "propaganda" and proving that the latter is being used in the school. But the Supreme Court has indicated that teaching about religion can be separated from religious ceremony or indoctrination,[70] a distinction not clearly different in kind or quantity from the education-propaganda distinction. Moreover, difficult as the attempt may be, the difficulty is factual and does not impeach the theory under which a student might attempt to prove that the use of mind-controlling propaganda is employed by the school and impairs his constitutional right of privacy.

The defense to the claimed invasion of privacy, expression, or association interests suggested in these several illustrations is likely to try to depreciate the effect of the crime-prevention method on these interests and to emphasize the need, in the judgment of the authorities, to use the challenged method to prevent crime. Whether the need is convincingly shown will depend on the nature and extent of crime that is proved and the rationale for using a particular preventive method rather than others. Empirical data reflecting

69. Stanley v. Georgia, 394 U.S. 557, 565 (1969).
70. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 224 (1963); *id.*, 374 U.S. at 300-01 (Brennan, J., concurring); *id.*, 374 U.S. at 306 (Goldberg, J., concurring).

changes in crime rates during the period of using the method would be relevant but perhaps could be easily distorted.[71] When the method under attack is surveillance and informing, any judicial enthusiasm for deferring to educational judgments is likely to be dampened by the specter of a police state, a vision that seems especially abhorrent in view of the enormous capacity of existing technology to invade individual privacy.[72] Use of student informers for surveillance purposes is also likely to appear particularly odious and to make judicial scrutiny especially likely. The presence of police or the use of weapons in the school would be more difficult to attack because the effect on constitutionally protected interests would ordinarily seem more tenuous. Still, some justification would have to be offered even for these crime-prevention methods, and if the justification were very weak, the challenge might prevail. For example, prevention of child molesting on the routes to and from school might seem to be a laudable objective to a court but to be a very unimpressive reason for stationing plainclothes policemen inside the school building.[73]

Student Claims—Equal Educational Opportunity.

A legal action in which a student challenges a particular law enforcement method on grounds of denial of equal educational opportunity is very similar in outline to a claim by a student that his rights as a citizen to privacy, expression, or association have been violated. In asserting an equal protection claim, however, the focus shifts from the interests of the student himself to a comparison between the student claimant and some other student or group of students. Instead of showing infringement of a protected interest, like speech, the student must show discrimination. What is relevant is not that an inschool intelligence system suppresses the student's right of expression but that his school is burdened with an intelligence system whereas another school is not. Furthermore, the student would argue that this difference results in substantial educational inequality because of the depressing effect of surveillance and informing on the educational atmosphere of the school. To support his claim, the student would have to show that there has been a difference in the crime-prevention methods used from

71. According to one report, a 25 percent reduction in criminal referrals followed the advent of the Tucson, Arizona, program. Robinson, PHI DELTA KAPPAN (Feb. 1967), at 278-80. The reduction might be explained in many ways, including the possibility that work done in school by police need not be referred out.

72. *See* A. MILLER, THE ASSAULT ON PRIVACY (University of Michigan, 1971); A. WESTIN, PRIVACY AND FREEDOM 67-168 (1967).

73. *See* Tucson Daily Citizen, June 1, 1970 (editorial).

school to school and that the difference matters educationally. The latter showing would involve considerations similar to those that would be involved in showing an invasion of privacy or a chilling effect on speech.

According to classical equal protection theory, the court would examine the student's claimed denial of equal protection only to see if there is a rational relationship between the classification (or means) and the legislative purpose (or end).[74] In the present context, the "classification" would mean classifying (or distinguishing) between schools by using a certain crime-prevention method in some but not others. The legislative purpose would be to prevent a particular kind (or kinds) of crime. Put to this test, the student would have a very difficult time succeeding with an equal educational opportunity claim unless the responsible education agency is totally unable to explain (or the court to imagine) why a particular crime-prevention method is used in school A but not in school B.

But if the primary discrimination (the difference in application of the crime-prevention method) happens to correlate closely with racial or socioeconomic composition of student bodies, a more rigorous standard of review might be applied. This would occur, for example, where all the schools in which policemen carry guns have enrollments that are 90 percent or more black and all other schools, in which there are no policemen or in which policemen do not carry guns, have enrollments that are 30 percent or more white. The combination of race or wealth discrimination and the fundamental nature of the student's interest in having an education at least as good as that of other students similarly situated might bring the case within the special area of judicial protection that Professor John E. Coons of the California Law School and his associates have christened "The Inner Circle."[75] If there is evidence that the coincidence of crime-prevention methods and race or wealth discrimination is deliberate *(de jure)* rather than accidental *(de facto)*, the case for special treatment is just that much stronger.[76]

In an Inner Circle equal protection case, the interest claimed to be unequally protected is favored by special judicial protection in

74. *See* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

75. *See* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 346 (1969).

76. *Compare* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (*de jure* segregation of municipal golf course found unconstitutional) *with* Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967) (*de facto* segregation of public schools found not unconstitutional).

much the same way as First Amendment interests. Thus, if the student's claim of being subjected to inequality in the application of crime-prevention methods is brought within the favored Inner Circle (because of its racial or wealth correlation), the discrimination must be justified by the state's compelling interest in using a particular crime-prevention method in that school and not in others. Simply establishing a rational (or possible) connection between the method used and the discrimination between schools would not be sufficient. In such a case, the student must still show the educational effect of the difference, but if he does (or if the court regards such an effect as a necessary consequence of the crime-prevention method used), the court would look closely to determine whether there is a strong justification for the different treatment of different schools and whether some less drastic alternative is available.

Remedies Based on Federal Claims

If a student is successful in arguing either a citizen or a student claim, he might obtain damages,[77] an injunction,[78] or an exemption from the compulsory attendance laws.[79] Generally speaking, an action for damages does not seem to fit the nature of a grievance based on the invasion of a student's rights as a citizen or the denial of equal educational opportunity. The payment of money by school or law enforcement officials would not seem a very desirable way to settle such a grievance.[80]

Injunctive relief seems to offer the student's best hope for an appropriate remedy. Even though injunctions are considered to be extraordinary remedies and the federal courts traditionally have been reluctant to enjoin state activities, several aspects of the student's case make injunctive relief a distinct possibility when the court decides in favor of the student's substantive claim. First, the injunction would be narrow in scope. At its broadest, it would enjoin certain conduct within only a single school system, and might be limited to a particular school or even to a particular crime-prevention method, a particular aspect of the method, or some speci-

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77. *See* 42 U.S.C. 1983. *See generally*, Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486 (1969); Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970).

78. *See* Anderson v. Sills, note 65, *supra*.

79. *See In re* Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. Child Div. 1958); *but cf.* State v. Vaughn, 44 N.J. 142, 207 A.2d 537, 540-41 (1965).

80. *But cf.* Pyle v. Blews, No. 70-1829-Civ. JE, 3 COLLEGE LAW BULLETIN 81, (S.D.Fla. Mar. 29, 1971) (student unconstitutionally suspended from school because of long hair awarded $282 in damages).

fied abuse of the method as applied in that school.[81] Second, the injunction would be negative in form, simply telling police or school authorities to stop doing something that interferes with the student's constitutional rights. Consequently, there would be little danger that the time and energy of the court would be exhausted by a long period of supervision. Third, shaping appropriate relief would not require the court to acquire educational expertise. Under none of the suggested actions would the court have a serious problem of educational administration or creating educational standards. The court would not, for example, be asked to design a program of compensatory education or to evaluate the quality of educational offerings. The effect on education would be a relevant consideration in some cases, but the main emphasis would be on familiar matters of judicial inquiry: determining whether there was an unjustifiable inequality or an undue invasion of speech, association, or privacy. Fourth, the court would not be asked for the kind of relief that entails fundamental changes in the existing system or structure of education. For example, in contrast to a claim for judicial relief from the inequality that results from current methods of financing education,[82] the kind of claim outlined here requires very modest and conventional judicial action.

As an alternative remedy, the court might excuse the student from the requirement of attending school. The student himself might seek this remedy by asking the court for a declaratory judgment or for an order enjoining the appropriate authorities from enforcing the compulsory attendance laws against him. Or the student could simply stay at home, and if he or his parents were prosecuted for his nonattendance, the constitutional claim based on the challenged crime-prevention method could be raised by way of defense.

Excusal from school seems a more appropriate form of relief when the student's claim derives from the First Amendment than from the equal protection clause. In the former case he complains of a school-produced injury to him directly; in the latter case he complains only that he is treated unequally—a complaint that, in theory, could be eliminated either by discontinuing the use of a particular crime-prevention method at the complainant's school or

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81. Contrast the scope of the injunction issued and reversed in Anderson v. Sills. *See* text at notes 65-66, *supra.*

82. *Compare* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969), *with* Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 538 (1968).

by introducing the same method into all comparable schools.[83] And it is clear that a court is going to be slow to adopt a remedy that excuses a student from school, especially if the court is impressed by statistics linking crime and truancy.[84] Yet exemption from school attendance may be the only reasonable response in some cases. If the court is convinced that crime and the methods of preventing it in school are both producing serious undesirable effects, it may be as reasonable to excuse the student for this reason as it would be if an unsafe school building endangered the student's life. The case for exemption seems to be especially strong since the student, in addition to facing physical dangers from exposure to drugs or violence, shows that he has a constitutionally protected interest that is seriously impaired by attempts to deal with these dangers.

IV. SEARCHES OF STUDENT LOCKERS

Searching for evidence is one obvious method of preventing crime in school. This method is limited, however, by the Fourth Amendment,[85] which the Fourteenth Amendment makes applicable to state and local governments,[86] including school districts.[87]

Under the Fourth Amendment, "unreasonable" searches and seizures are prohibited. The difficult task of the courts has been to identify standards for determining unreasonableness and to express their conclusions in understandable terms.[88] Although the specific legal principles resulting from the courts' performance of this task are complex and often seem elusive, it is possible to identify the competing interests that the courts must attempt to reconcile in applying the Fourth Amendment. The interest of individual members of society in securing personal privacy must be balanced

83. In the *Skipwith* case, note 79, *supra*, the defense to the truancy prosecution was based on denial of equal protection, but in that case the inequalities (related to *de facto* segregation) could not have been readily cured by an injunction.

84. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, 233 (1967).

85. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized."

86. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949).

87. *See* Cooper v. Aaron, 358 U.S. 1, 16 (1958).

88. *See, e.g.*, Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474 (1961); La Fave, *Search and Seizure: "The Course of True Love . . . Has not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, Relating the "unreasonable searches and seizures" clause to the "warrants . . . upon probable cause" clause has been a source of particular difficulty. *See* La Fave, *Street Encounters and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 53 (1968); Note, 77 YALE L.J. 521, 524 n. 13 (1968); Comment, 28 U. CHI. L. REV. 664, 678-92 (1961).

against the collective interest of society in obtaining the results of a search. These interests will sometimes be referred to in this paper as "the privacy interest" and "the law enforcement interest." The latter phrase is based on the fact that society's interest in searching has as its most common purpose the enforcement of the criminal law.

The necessity of determining how this balance will be struck is implicit in the Fourth Amendment itself and is brought to the surface in every search and seizure case. Accordingly, this need to balance the law enforcement and the privacy interests lies at the heart of the adjudication of any controversy over the propriety of searching a student's school locker. In a locker search case, as in other Fourth Amendment cases, a conclusion that a search is unreasonable is fundamentally a judgment by a court that a search was conducted under circumstances allowing too little scope to the privacy interest and too much scope to the law enforcement interest.

Although the concept of "reasonableness" may seem to suggest a simple factual judgment, that appearance is quite misleading. Factual differences are extremely important in applying the Fourth Amendment, but the conclusion that a particular search is or is not reasonable should be understood as a policy decision reflecting value judgments about what the Constitution ought or ought not to permit.

In three recent cases students challenged the legality of public school locker searches.[89] Similar questions were raised in two cases involving searches of dormitory rooms in public colleges.[90] Because of the extensive common ground in the public school and college cases and because of the interdependence of these two types of cases as authority for each other, the dormitory room searches will be given extensive treatment here along with the locker search cases. In addition, related issues have been presented by recent cases involving searches at *private* colleges[91] and searches of the *person* of public school students.[92] These cases will be considered

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89. People v. Overton, 24 N.Y.2d 522, 301, N.Y.S.2d 479, 249 N.E.2d 366 (1969); *In re* Donaldson, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220, (1969); State v. Stein, 203 Kan. 638, 456 P.2d 1 (1968), *cert. denied*, 397 U.S. 497 (1970).

90. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971), *aff'g.* 316 F. Supp. 624 (M.D. Ala. 1970); Moore v. The Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968).

91. People v. Cohen, 52 Misc. 2d 366, 292 N.Y.S.2d 706 (1st Dist. Ct. Nassau Cty. 1968); Commonwealth v. McCloskey, 217 Pa. Super. 432, 272 A.2d 271 (1970).

92. People v. Jackson, App. Div. 2d , 319 N.Y.S.2d 731 (1971); *In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); People v. Stewart, 63 Misc. 2d 601, 313 N.Y.S.2d 253 (1970); Mercer v. State, 450 S.W.2d 715 (Tex. Cir. App. 1970).

in this paper only insofar as they contribute to the analysis of the three school locker and two public college dormitory room cases.[93]

Although the law applicable to these five cases was (and is) by no means free from doubt, there was a reasonable basis for the student's contention that each of the searches was illegal. Nevertheless, the student lost in four of the five cases, including all the locker cases. With the single exception, this group of cases was certainly not generous to the student. The decisions suggest that, in applying the Fourth Amendment in a public school or college setting, the law enforcement interest should be given rather wide latitude and the privacy interest of students should be rather circumscribed. In some of the discussion that follows, I will question whether the correct balance has been struck.

THE CASES

People v. Overton[94] involved a search of a high school student's locker for marijuana cigarettes. The police officers had a warrant to search the student and his locker, but the locker warrant was invalid. The vice-principal of the school had a key to all school lockers and apparently the right to enter the lockers for at least some purposes. He opened the locker and purported to authorize the search that produced the cigarettes. After the original decision by the New York Court of Appeals that the search was reasonable,[95] the case was remanded to that court by the United States Supreme Court for further consideration.[96] The original decision was reaffirmed by the New York court and was subsequently left undisturbed by a federal district court that passed on the student's petition for *habeas corpus*.[97] The appeal from the denial of the

93. *See also* Speake v. Grantham, 317 F. Supp. 1253 (S.D. Miss. 1970) (challenge to indefinite suspension of college students rejected where evidence of possession of false and disruptive pamphlets was obtained by a search and seizure of students' microbus that was reasonable under the "plain view" doctrine); Keene v. Rodgers, 316 F. Supp. 217 (D. Maine 1970) (challenge to dismissal of Maine Maritime Academy midshipman rejected where evidence of possession of desecrated American flag, can of beer, and bag of marijuana was obtained in search of midshipman's automobile that was reasonable because it was conducted by officer of quasi-military academy for purpose of enforcing discipline); Cook v. State, 85 Nev. 692, 462 P.2d 523 (1970) (in criminal proceeding *habeas corpus* petition is improper procedure for challenging admissibility of evidence claimed to have been taken from college dormitory room in violation of Fourth Amendment); State v. Bradbury, 109 N.H. 105, A.2d 308 (1968) (valid warrant to search college room for possession of marijuana does not authorize search of individual who happens to be on premises). *See also* United States v. Coles, 302 F. Supp. 99 (D. Maine 1969).

94. 24 N.Y. 2d 522, 301 N.Y.S.2d 479, 249 N.E.2d 366 (1969).

95. 20 N.Y. 2d 360, 283 N.Y.S.2d 22, 229 N.E.2d 596 (1967).

96. 393 U.S. 85 (1968).

97. Overton v. Reiger, 311 F. Supp. 1035 (S.D.N.Y. 1970).

habeas corpus petition was dismissed as moot[98] and the subsequent petition for *certiorari* was denied by the United States Supreme Court.[99]

Many of the circumstances in *State v. Stein*[100] were comparable to those in *Overton*. The principal of the high school had a key to all students' lockers; he opened the locker and authorized a search by the police. In this case, the police were looking for stolen property, which they eventually found in a bus station locker that fit a key found in the defendant's school locker. Besides having the principal's consent, the police unambiguously requested and received permission from the student himself to search the locker. The Kansas Supreme Court upheld the search, and the student's petition for *certiorari* to the United States Supreme Court was denied.

In the third locker case, *In re Donaldson*,[101] the search was made solely by and on the initiative of the high school's vice-principal. Having been told by a student that methedrine pills ("speed") could be purchased in school, the vice-principal instructed the student to make a purchase. The student later returned with the pills and told the vice-principal the purchase had been made from the defendant, another student. The vice-principal searched the defendant's locker and found marijuana, which he then turned over to the police. The search was held to be reasonable by the California Court of Appeals and this decision was not appealed to the California Supreme Court.

The two dormitory room cases, *Moore v. The Student Affairs Committee of Troy State University*[102] and *Piazzola v. Watkins*,[103] grew out of the same set of facts. The searches in these cases were prompted by allegedly "reliable" information that narcotics were present in certain rooms at Troy State University in Alabama. After this information was obtained by the state and federal law enforcement officers, the search was undertaken by them with the cooperation of certain college administrative officials but without a search warrant. Marijuana was found in some of the rooms searched. The two cases were heard in federal court by the same trial judge (two years apart). In *Moore* the search was found to have been made jointly by narcotics agents and the dean of men and to be reason-

98. —F.2d— (2d Cir. No. 34965, Sept. 28, 1970).
99. 401 U. S. 1003 (1971).
100. 203 Kan. 638, 456 P.2d 1 (1968), *cert. denied*, 397 U.S. 947 (1970).
101. 269 Cal. App. 2d 599, 75 Cal. Rptr. 220 (1969).
102. 284 F. Supp. 725 (M.D. Ala. 1968).
103. 316 F. Supp. 624 (M.D. Ala. 1970).

able under the Fourth Amendment; but in *Piazzola* the participation in the search by university officials was regarded as subordinate to the primary role played by the police, and the search was held to be in violation of the student defendants' Fourth Amendment rights. *Moore* was not appealed, and *Piazzola* was affirmed by the United States Court of Appeals for the Fifth Circuit.[104]

The narrow issue in each of these five cases was the admissibility of the evidence found as a result of a search that was claimed to be illegal. In the *Moore* case the student was attempting to exclude the evidence from a college discipline proceeding as a result of which the student was indefinitely suspended. In each of the other cases the exclusion was sought in a criminal (or juvenile) proceeding. At the heart of each of the five cases was either of two questions: whether the administrative official of the school (or college) had the power to make a warrantless search of a locker (or room), or whether such an official had the power to consent to such a search by the police. For convenience of discussion, I will consider separately four basic issues concerning the legality of school locker (and college room) searches and the admissibility of the evidence obtained from such searches:

1. Are the police authorized to search without a warrant and without consent?
2. Are appropriate school or college officials authorized to search without a warrant and without consent?
3. Under what circumstances may a consent validate a search that would otherwise be illegal?
4. If a search was illegal, may the evidence obtained as a result of the search nevertheless be admitted?

POLICE SEARCH WITHOUT WARRANT OR CONSENT

In *Piazzola v. Watkins*, a five-year prison sentence for marijuana possession was set aside because the critical evidence was obtained by the police in a search of the defendant's college dormitory room without a warrant and without a valid consent. There was no suggestion in any of the other cases that a warrantless police search would be lawful without a valid consent.

To determine whether warrantless searches of school lockers by law enforcement officers are lawful, it is necessary to answer

104. 442 F.2d 384 (5th Cir. 1971).

several distinct questions stemming from the language of the Fourth Amendment:

> The rights of the people to be secure in their houses, papers, and effects against unreasonable searches and seizure, shall not be violated. . . .

In these words, are students "people," are their school lockers "effects," and are warrantless searches "unreasonable"?

Fourth Amendment Protection of Students

None of the cases seemed to question the applicability of the Fourth Amendment to the persons concerned. The college students in *Moore* and *Piazzola* were explicitly found to be entitled to Fourth Amendment protection. In the other cases the courts seemed to assume that the public school students were covered, though the *Donaldson* opinion may have suggested that the student's Fourth Amendment protection is of a lower order than the type available to adults.[105] Earlier in this paper, I pointed out the holding of the Supreme Court in the *Tinker* case that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[106] It should be equally true that Fourth Amendment rights accompany students through that same gate. Similarly, the *Gault* decision, which held that children charged with delinquency were entitled to constitutional rights comparable to those available to adult criminal defendants, would seem to require that

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105. The court stated that the school, standing *in loco parentis*, had the "right to use moderate force to obtain obedience" and that the right extended to locker searches. 75 Cal. Rptr. at 223. Of course the invocation of *in loco parentis* authority is just a way of stating the conclusion. *In loco parentis* has been discredited at the college level. *See, e.g.*, Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wisc. 1968); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. Rev. 368, 375, 78 (1963). And its continuing vitality in the high school is doubtful. *See* The National Association of Secondary School Principals, *The Reasonable Exercise of Authority* 5 (1969); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545, 559-62 (1971). At the very most, the *in loco parentis* doctrine means that the school has *some but not all* parent-like powers over the child. The question concerns which powers it should have; with respect to locker searches, that question can be answered only by examining the considerations that would be controlling in any event—i.e., those relevant to reconciling the school's and the state's interest in school discipline and law enforcement with the student's interest in privacy. It seems reasonably clear that the school-child and the parent-child relationships are quite different, that there is no conscious bestowing by parents of unlimited power to make such searches, and that many parents would object to a broad power. *But cf.* Knowles, *Crime Investigation in the Schools: Its Constitutional Dimensions*, 4 J. of Family Law, 151, 155 (1964), written before the *Gault* and *Tinker* decisions. Moreover, I would not assume that a child has no privacy interest whatsoever against his parent. *See* People v. Flowers, 23 Mich. App. 523. 179 N.W. 2d 56 (1970). *But cf.* State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965), *cert. denied*, 384 U.S. 909 (1966).

106. See page 12, *supra*.

people cannot be disqualified from enjoying Fourth Amendment rights because they are young.[107]

Fourth Amendment Protection of Lockers

The application of Fourth Amendment protection to college dormitory rooms was clearly established by the *Moore* and *Piazzola* cases. The other cases seem to conclude that public school lockers are also protected, but that conclusion is not wholly unambiguous. For example, the first *Overton* opinion of the New York Court of Appeals stated:

> It is axiomatic that the protection of the Fourth Amendment is not restricted to dwellings. Bart Importing Co. v. United States. 282 U.S. 344 (1931). A depository such as a locker or even a desk is safeguarded from unreasonable searches for evidence of a crime. United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951). [108]

But the court then went on to stress the school's ownership of the lockers.[109] The *Stein* opinion stated that the status of the school locker was "somewhat anomalous"[110] and that "the defendant's argument must fail because of the nature of a high school locker."[111]

While these statements should not be disregarded, they must be placed in the context of the opinions as a whole. From this perspective, statements about the nature or ownership of the locker can be related to an overall emphasis on the educational setting and the particular relationship between the student and school officials. The cases seem to conclude that the Fourth Amendment may give only limited protection to student lockers, but not that Fourth Amendment protection is entirely lacking.

At least the second part of this conclusion seems to be required by the general law concerning the Fourth Amendment. A number of decisions have applied the Fourth Amendment to areas not physically different in any important respect from rooms and lockers.[112] More important, since *Katz v. United States* the Supreme Court has emphasized that "the Fourth Amendment protects peo-

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107. *See* page —, *supra.*
108. 20 N.Y.2d at 361, 283 N.Y.S.2d at 23.
109. 20 N.Y.2d at 363, 283 N.Y.S.2d at 25 ("nonexclusive nature of locker"); 24 N.Y.2d at 525, 301 N.Y.S.2d at 481 ("title" in board of education); 24 N.Y.2d at 526, 301 N.Y.S.2d at 482 ("certainly not private property" of student).
110. 456 P.2d at 3.
111. *Id.*
112. *See* Katz v. United States, 389 U.S. 347 (1967) (telephone booth); Stoner v. California, 376 U.S. 483 (1964) (hotel room); Rios v. United States, 364 U.S. 253 (1960) (taxi cab); United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (desk).

ple, not places."[113] The *Katz* case invalidated electronic eavesdropping (regarded as a search) of a telephone booth conversation. The Court held that the Fourth Amendment privacy interest is not controlled by property considerations such as ownership of the area searched.

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[114]

Katz and subsequent decisions have based Fourth Amendment protection on the searched person's reasonable or justifiable "expectation of privacy."[115] As articulated by Mr. Justice Harlan, the test is partly whether the person has sought to "preserve as private" the area searched and partly whether the person seeking protection has an interest that is appropriate for such protection.[116] The first part of the test poses a factual question: What did the student expect or intend? The second part of the test necessarily involves an exercise of judgment by the court: a determination of what society *ought* to recognize as private.

It seems to me there is a very strong case for recognizing a privacy interest in both school lockers and college dormitory rooms. The high school student is required by law to attend school, and his locker is one of his few harbors of privacy within the school. It is the only place where he may be able to store what he seeks to preserve as private—letters from a girl friend, applications for a job, poetry he is writing, books that may be ridiculed because they are too simple or too advanced, or dancing shoes he may be embarrassed to own. Although the college student attends school not under legal compulsion, he has a different and perhaps greater privacy investment in his dormitory room. For all practical purposes, his room is his home—like the boardinghouse or apartment of other students and the dwelling place of any citizen.

Of course, it is not necessary to reach the identical conclusion about school lockers and college rooms (either on this question of Fourth Amendment applicability or on other questions such as those treated later concerning the reasonableness of a search by

113. *See* Katz v. United States, note 112, *supra* at 351.
114. *Id.*
115. *See id.* at 353; Mancusi v. Deforte, 392 U.S. 364 (1968).
116. 389 U.S. at 361 (Harlan, J., concurring). *See also* United States v. White 401 U.S. 745, 768, (1971) (Harlan, J. dissenting).

education officials or the validity of a consent).[117] If a distinction is to be made, however, the factors do not point uniformly in one direction. Unlike his college counterpart, a public school student does have a home to return to at the end of each day. Moreover, the younger students, below the college level, might seem to need more supervision and protection because of their inexperience and immaturity. Furthermore, because there are many more students concentrated in a small area in school than in college, there may be a greater exposure to the dangers of any criminal or delinquent behavior and thus a greater need of supervision of all areas where the instruments or evidence of crime might be secreted. Yet this same concentration of students contributes heavily to an absence of any privacy for children while in school, and thus to a greater need to have whatever privacy a locker may afford. In addition, children below the college level attend school under the compulsion of law and are subject to extensive regulation in their inschool lives. These are dimensions that argue with special force for protecting the privacy of students in public school in whatever way is possible.

The decision whether the student had a reasonable expectation of privacy might be influenced by the existence of regulations reserving certain rights to search the locker (or room) by school (or college) officials. The effect of such regulations will be considered shortly in greater detail.[118] At this juncture, however, it is sufficient to caution against attributing very far-reaching consequences to such regulations. In the first place, there is always a threshold question about the extent to which such regulations actually notify the affected persons that his privacy interest is to be restricted in some way. Even concerning those regulations about which the student receives fair notice, there is a fundamental question of their effect in authorizing a search. Obviously, there would be little substance to constitutional rights if they could be easily qualified or eliminated by the promulgation of regulations.

Reasonableness of Warrantless Searches

Assuming now that the Fourth Amendment does clearly cover the kinds of searches considered here, it remains to consider in this section whether law enforcement officers must have a warrant to

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117. *See, e.g.*, Piazzola v. Watkins, 442 F.2d 284, 289 n.2 (5th Cir., 1971); Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725. 730 n. 10 (M.D. Ala., 1968).

118. *See* pages 41-45, *infra.*

make a legal search. Although a search warrant is not an absolute condition for a reasonable search, the Supreme Court has repeatedly demonstrated its preference for searches under a warrant.[119] In *Katz v. United States*, the Court stated:

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," Agnello v. United States, 269 U.S. 20, 33, (1925), for the Constitution requires 'that the deliberate impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .' Wong Sun v. United States, 371 U.S. 471, 481-82 (1963). 'Over and again this court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,' United States v. Jeffers, 342 U.S. 48. 41 (1951) and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.[120]

The claimed advantages of a warrant are the determination of "probable cause" for the search by a *neutral magistrate*, rather than by the police; the establishment *in advance* of a specified factual basis justifying the reasonableness of the search; the creation of a *record* that will facilitate subsequent judicial review of these justifying grounds; and the limitations on the search's scope and manner that are imposed by the *terms of the warrant.*

Although warranted searches are favored, the reasonableness of various types of unwarranted searches has been established: emergency searches,[121] searches incident to arrest,[122] and searches carried out in hot pursuit.[123] In the five cases considered here, there was no claim that the conditions necessary for any of these exceptions applied. It is perhaps arguable that the circumstances in some of the cases would have justified the exceptions in favor of emergency searches or searches incident to arrest, but it is not likely these arguments could have succeeded.

An "emergency" might be suggested by the fact that, in each of the cases, there were grounds for suspecting that evidence of illegal activity would be found in the searched areas. Yet, except possibly in *Moore*, in none of the cases was there any basis for suspecting imminent destruction of that evidence, thus requiring emergency action. In fact, in *Moore*—and probably also in *Stein*—it seems

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119. *See*, Chimel v. California, 395 U.S. 752, (1969); United States v. Ventresca, 380 U.S. 102 (1965); Beck v. Ohio, 379 U.S. 89 (1964).

120. 389 U.S. 347, 357 (1967).

121. *See* Schmerber v. California, 384 U.S. 757 (1966); Carroll v. United States, 267 U.S. 132 (1925).

122. *See* Chimel v. California, 395 U.S. 752 (1969).

123. *See* Warden v. Hayden, 387 U.S. 294 (1967).

likely that a warrant could have been obtained by the time the search was made.[124] And in *Overton* a search warrant had been obtained but it was invalid. Furthermore, even assuming that the search would have been delayed somewhat while a warrant was being obtained, in some of these cases precautions could have been taken to prevent the suspect from destroying the evidence.[125]

Since an arrest was not made prior to the search in any of these cases, it is obvious that the search could not have been justified as "incident to arrest."[126] Moreover, even had there been a prior, lawful arrest, it is very doubtful that a search without a warrant would have been justified in the circumstances of these cases. The Supreme Court decision in *Chimel v. California*,[127] greatly restricting the previous rule that allowed very broad searches incident to an arrest,[128] would seem to prohibit incidental searches except for evidence within a student's reach (and subject to destruction) at the time of arrest.

Of course it is always possible that the courts will recognize new exceptions to the general requirements that searches be made under the authorization of a warrant. The Supreme Court's recent approval of warrantless stop and frisk practices might be thought of as such a new exception in the arrest (seizure) area.[129] It is clear, though, that none of the cases discussed in this paper purports to carve out a new general rule authorizing warrantless searches of school lockers or college dormitory rooms by law enforcement officers.[130]

ADMINISTRATIVE SEARCH WITHOUT WARRANT OR CONSENT

The language of the Fourth Amendment does not single out searches by law enforcement officers or searches designed to obtain criminal convictions. It guarantees security against "unreasonable

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124. In *Moore*, the search was eventually carried out at 2:30 p.m.; the student whose room was searched was under direct suspicion no later than some time in the morning of the search day and the information that the student was packing to leave the campus temporarily was received at 1 p.m. 284 F. Supp. at 727-28. In *Stein*, police officers visited the school and eventually searched the defendant's locker the day after the burglary for which the defendant was convicted.

125. *See* McDonald v. United States, 335 U.S. 451 (1948).

126. In *Moore*, the court expressly stipulated that the search was not conducted as an incident to an arrest. 284 F. Supp. at 728.

127. 395 U.S. 752 (1969).

128. *See* Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56 (1950). (both overruled by *Chimel*).

129. Terry v. Ohio, 392 U.S. 1 (1968).

130. *But see In re* G., 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970), discussed in text at notes 169-72.

searches and seizures" generally. Furthermore, the Fourteenth Amendment (through which the proscriptions of the Fourth Amendment are brought to bear on state and local governments) applies only to "state action," but that concept has been construed to cover any public official acting in behalf of a state or any of its agencies or subdivisions. Nonetheless, until the Supreme Court's decision in *Camara v. Municipal Court,*[131] it was plausible to argue that the invalidity of warrantless searches did not apply to action by administrative officers for administrative purposes.[132]

In the *Camara* case, the Supreme Court held that a housing inspector attempting to enforce a housing code could not undertake a general area inspection inside the petitioner's residence without a warrant. The Court also held, however, that a lower standard of "probable cause" should control the issuance of the warrant than would apply in the case of a search for evidence of a criminal violation. A more exacting standard would greatly encumber achievement of the important public interest in carrying out a housing inspection program. Moreover, such an inspection is "neither personal in nature nor aimed at the discovery of evidence of crime" and thus involves a "relatively limited invasion" of privacy.[133] For these reasons the Court held that probable cause would be established "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[134]

It is important to stress both aspects of the case. First, the Fourth Amendment does apply to administrative searches and prohibits such searches if made without a warrant. Second, because of factors peculiar to general area housing inspections, a relaxed standard of probable cause applies for the purpose of issuing the required search warrant. These two aspects leave a hiatus from which a third inference might be drawn: when the special factors are absent, administrative searches can be made only under the authority of a warrant and the issuance of the warrant is appropriate only when the ordinary standards, rather than the relaxed standards of *Camara,* are satisfied.

The *Camara* decision would seem to be significant to searches of school lockers and college rooms by education authorities. For the purpose of examining this significance further, it seems useful to

131. 387 U.S. 523 (1967).
132. *See* Frank v. Maryland, 359 U.S. 360 (1959).
133. *See* 387 U.S. at 537.
134. *See id.* at 538.

distinguish four different situations in which administrative searches might be made by public school or college officials.[135]

1. The search is part of a general inspection (of lockers or rooms) to maintain standards of cleanliness, sanitation, or neatness. The search does not, in advance, single out a particular student in any way and there is no sanction (or possibly a very minor sanction) for failing to meet the prescribed standards.
2. The search is designed to locate evidence of an infraction of school or college regulations for which a serious sanction such as expulsion might be imposed. The school or college official making the search is not attempting to enforce the laws of society at large. But the search is focused on a particular student, and it may produce very severe consequences for that student.
3. This situation is the same as the preceding one except that the school regulation which the student is suspected of violating is, in substance, also a criminal violation. This would be true when the regulation by its own terms prohibits students from "violating the law" (or a particular law) or when substantially the same conduct proscribed by the regulation is also conduct prohibited by criminal law.
4. The "administrative" search is undertaken not to enforce a school or college rule, but for the express purpose of obtaining evidence that a student has committed a criminal offense.

In my judgment, only the first situation is comparable to *Camara;* none of the other three situations should be subjected to the relaxed probable cause standard of that case. It is my conclusion that there are not likely to be significant differences between police searches and the administrative searches described by situations two, three, or four and that the student's interest in privacy protected by the Fourth Amendment is likely to be substantially impaired by these three types of administrative searches.

This conclusion seems nearly beyond question in the fourth situation where, in marked contrast to *Camara,* the inspection by the educational administrator would be "personal in nature" and "aimed at the discovery of evidence of crime." Arguably, the educator is

135. For purposes of the discussion in this paper, an educational "administrator" (or "authority" or "official") includes a teacher or any other educational personnel making the search by reason of his student-educator relationship or his employment by the educational institution. Administrative searches as used in this paper would not, however, include searches by the campus police or their equivalent, whether or not such persons are technically regarded as law enforcement officers by the law of the state.

less singlemindedly bent on law enforcement, more likely to have the student's interest at heart, and therefore more likely than the police to conduct the search in a gentle, considerate fashion. But the factual basis of this argument seems very doubtful and, at the very least, to fall short of providing support for a constitutional distinction between the two kinds of searches. The scope and effect of the search would be likely to be the same regardless of who conducts it. A criminal prosecution is likely if a search is conducted and evidence of a criminal violation is found by the education official. The student will certainly assume that this official will turn any evidence over to the police, and the educator is likely to feel duty bound to do just that. The law enforcement character of the search may seem most obvious when the educator and the policeman act jointly; but the search clearly has this character also when it is made by the educator at the invitation of the police or even when the educator undertakes the search on his own initiative with the intention of turning over any incriminating evidence to law enforcement officials. In short, when the sole purpose of the search is to find evidence of a crime, the schoolman is a policeman, whatever his formal title.

Although the third situation can be distinguished from the fourth, the distinction does not seem constitutionally significant. In this situation, the evidence prompting the search will simultaneously tend to prove both a school rule violation and a criminal law violation. Plainly, if the suspected evidence is found, the student would be placed in immediate jeopardy of both disciplinary and criminal prosecution. Without the limitations that a warrant might impose, the invasion of his privacy resulting from the search would likely be as relentless in every respect as if he were merely a suspected criminal whose house or room or locker was being searched by the police. In many instances, the educator will be conscious of the fact that the school or college regulation has been premised on the criminal law. When this is true, an administrative search is likely to be conducted without any clearly articulated distinction between its criminal and disciplinary purposes. If anything, an educational administrator might tend to be even more intent on discovering evidence of a crime, to help preserve the integrity of his institution. It would seem artificial to characterize the search as "administrative" (in contrast to "criminal") with the suggestion that the criminal violation could be treated as an afterthought.

The second situation, involving no elements of a criminal search, obviously presents a more difficult question. Since it involves a

purely "administrative search," there is room to argue that it is somewhat like *Camara* and distinguishable from situations three and four. Plainly, the absence of any threat of a criminal sanction is important but is likely to appear more important than it actually is. Disciplinary sanctions have been described as potentially "more grave" than punishment for criminal violations,[136] and who can doubt that. It is also arguable that, in practice, school rules that have no criminal underpinnings may seem to present less of a threat to the educational institution and, thus, to prompt a less aggressive search. It seems probable, however, that the seriousness of the sanction provides a far better index to the predictable intensity of a search than the presence or absence of a criminal origin or analogue. Of course, many of the most common serious educational offenses, e.g., violence, theft, drug distribution, do have a counterpart in the criminal law. But some rule violations regarded by some educators as serious—anything from plagiarism to dissemination of forbidden "underground" newspapers—have no criminal character. Any search for evidence of such serious educational offenses would likely be pressed with considerable urgency and, in *Camara* terms, would be "personal in nature." The resulting invasion of privacy does not seem any less because the evidence sought would ultimately be used as a ground for imposing a severe, though noncriminal, sanction against the student.

To put it mildly, the conclusions and arguments just stated are not overwhelmingly supported by the decided cases discussed in this paper. In either holding or dictum *all* five of these cases approved of warrantless searches by educational administrators over student objections. None of the cases even cited *Camara*. There is no way to know whether the omission was a result of oversight or a conscious decision that *Camara* has nothing to teach us about searches conducted by educational administrators. It does seem clear, though, that the rationale of these cases grows out of special considerations relevant to educational institutions rather than out of any general view that administrative searches are beyond the reach of the Fourth Amendment. Still, *Camara* seems to have some relevance to these cases and it provides a useful comparison for some of the reasoning found in them.

The main reasons given by the courts for upholding searches by education officials are discussed in the following paragraphs.

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136. *See* Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wisc. 1968).

Search by Private Citizen.

According to the opinion in *In re Donaldson,* the vice-principal who searched the student's locker was not "a governmental official within the meaning of the Fourth Amendment so as to bring into play its prohibitions against unreasonable searches and seizures." The court's theory is quite inscrutable. A vice-principal of a high school obviously exercises the power of the state when he performs the duties assigned to him. Although it is possible for any government employee to act privately, the facts reported in the case completely belie any notion that the search challenged in this case was undertaken in an individual capacity. In fact, most of the court's opinion is devoted to various justifications of the vice-principal's action *because* he was acting in his official capacity: sharing the authority of the master key to all student lockers, insuring the protection of all students, preserving the law-and-order atmosphere necessary for the educational process, and partaking of the school's *in loco parentis* power.

Although this reasoning seems totally untenable to me, it has been used several times. The *Donaldson* language was quoted with approval in the opinion of *In re G.*[137] in partial justification for using evidence of the possession of amphetamine pills in a delinquency proceeding against the student. The pills were found in a Kodak film canister that was among the contents of the student's pockets required to be emptied by the dean of students.

Comparable reasoning was followed in *People v. Stewart,*[138] another empty-the-pockets case. In the *Stewart* case, the court rejected the student's motion to suppress evidence of heroin possession on the theory that the dean of boys was acting as a private person while the Fourth Amendment was not intended as a restraint "upon other than governmental agencies." For this proposition, the court found support in the Supreme Court's decision in *Burdeau v. McDowell.*[139] *Burdeau* provides no authority for the court's conclusion. It held that the Attorney General of the United States could use evidence illegally obtained by a *private person*—that is, really a private person, one not working for government at any level in any way.[140] Plainly, the dean of boys was not less an agent of government than the policeman stationed in the school building to whom the evidence of heroin possession was turned

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137. 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970).
138. 63 Misc. 2d 601, 313 N.Y.S.2d 253 (Crim. Court 1970).
139. 256 U.S. 465 (1921).
140. *But see* Annot., 36 A.L.R.3d 553, 566 (1971).

over, nor less than the housing inspector who attempted to make the search in *Camara*.

The private citizen theory seems to have been extended to a point of ultimate absurdity by the court in *Mercer v. State*,[141] which said the searching principal was not acting as an arm of government because he was acting *in loco parentis*. The court's reasoning, in other words, is that because a parent would not exercise governmental power, the principal acting in the parent's place does not either. Perhaps what is especially absurd is this overblown view of *in loco parentis*.[142] Giving everything that is possible to give to the *in loco parentis* concept, the error of the court's position is almost too obvious to state: under a system of compulsory education, the school authority acquires power over the child only because of the law and because of that authority's role as an agent of the governmental branch charged with carrying out the law. It is errant nonsense to characterize this governmentally derived power as "*in loco parentis*" and then to deny its governmental origin.[143]

Absence of Criminal Character or Purpose.

The legality of the search in *Moore* was based partly on the nature of the disciplinary proceedings, which, the court said, were not "criminal proceedings in the constitutional sense."[144] The *Camara* case certainly casts doubt on the significance of being able to characterize the case as noncriminal. It is notable that in *Moore*, as in *Camara*, a reduced standard of probable cause was employed. But in *Camara* the lower standard applied to *issuing a warrant* authorizing a search; in *Moore*, by contrast, the lower standard applied to the making of a *search without a warrant*. Apart from this fundamental distinction, the special circumstances justifying a relaxed standard in *Camara* were absent in *Moore*. Unlike *Camara*, the search in *Moore* was for the express purpose of finding evidence *against* the student resisting the search, and the opening of sealed containers contemplated by the regulation in *Moore* was certainly not a minimal invasion of privacy.

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141. 450 S.W.2d 715 (Tex. Cir. App. 1970).

142. *See* note 105, *supra*. In People v. Jackson, App. Div. 2d, 319 N.Y.S.2d 731 (1971), involving the search of a student's person, the court argued that the *in loco parentis* relationship was critical in applying the standard of reasonableness, but not that this relationship made the Fourth Amendment inapplicable.

143. The dissenting opinion in the *Mercer* case argued that, unlike the school, the parent had no duty to report the evidence discovered to the police. *See* Mercer v. State, at 721-22.

144. 284 F. Supp. at 730.

In his *Piazzola* opinion, Judge Johnson again stressed the difference between disciplinary and criminal sanctions. But, where as in *Moore* he had seemed to stress the nature of the proceeding, in *Piazzola* he stressed the purpose of the search. This apparent shift in emphasis is somewhat disturbing. To appreciate the difference it is essential to recall that both cases grew out of the very same occurrence at Troy State University on the morning of February 28, 1968. Only different students and different rooms were involved. Thus, in both cases—because, factually, they are largely the same case—the search was undertaken at the initiative of the police but with the cooperation and/or consent of the college administrators. Yet in the one case the court concluded that the search was conducted by college administrators for educational purposes, and in the other that the search was conducted by the police for criminal law purposes. It is difficult to understand how the relative roles of college and law enforcement officers could be viewed so differently in the two cases; it is still more difficult to understand how the *purpose* of the search could have changed so fundamentally. Possibly the difference did in fact exist as a result of a chance distinction between the peculiar circumstances of the searches of two different rooms. Or, possibly, only the record before the court was different. Or, finally, the court's view of the facts may have changed in the two-year interval between the cases.[145]

Assuming the accuracy of the factual distinction reflected by the two opinions, some interesting consequences follow. The search in *Moore* was reasonable because it was made by college administrators pursuing educational purposes. But the *evidence* that led to the expulsion of the student in *Moore* would also tend to support a criminal conviction. Since the search was reasonable, nothing prevented the evidence from being turned over to the police and used against the now ex-student in a criminal prosecution. In fact, the *Moore* opinion specifically noted that a criminal action was pending against the student.[146] The final result could be a conviction, in contrast to *Piazzola*, which resulted in setting aside the conviction. In sum, then, two students are prosecuted for the

145. One striking difference between *Piazzola* and *Moore* is probably consistent with either a change of view or a different record. In *Moore*, Judge Johnson stated, in dictum, that the school authorities "had enough information to amount to probable cause to believe the conduct was criminal." 284 F. Supp. at 730 n. 11. In *Piazzola*, he stated that the state's evidence "failed completely" to prove the facts and circumstances necessary to show the informer's reliability and the factual basis of the informer's conclusions that are necessary to establish probable cause. 316 F. Supp. at 627.

146. *See* 284 F. Supp. at 727 n. 1.

same criminal offense on the basis of substantially the same evidence seized as a result of substantially similar searches, both initiated by the same law enforcement officers on the strength of the same information; but different verdicts are reached because a college official did or did not have a primary role in the search.

Unfortunately, the implications of the two cases do not end with the unappealing conclusion of inconsistent treatment of similarly situated persons. The *Moore-Piazzola* distinction is not alone in using the purpose of a search as a key to its reasonableness. The *Donaldson* opinion noted that the vice-principal of the school had searched the student's locker "not to obtain convictions, but to secure evidence of student misconduct."[147] In various other contexts, the noncriminal purpose of a search has been heavily emphasized as a justification. But these other contexts tend to be unique and, in so far as they are not, it is not clear that the cases have fully taken account of the *Camara* decision.[148]

It does seem clear, at least, that locker and dormitory cases present special considerations. The searches in these types of cases are prompted by circumstances, such as the use of drugs, that are likely to be recurrent, and consequently, to encourage education officials and the police to combine and coordinate their efforts in dealing with these situations. Examples of such joint operations have already been documented at both the college[149] and high school[150] levels, and many other instances undoubtedly exist or are in the making. At the same time, education is not likely to thrive in an atmosphere characterized by suspicion and distrust. If the identity of the searcher and the purpose of the search are given great importance, college (or school) officials are likely to be encouraged to undertake searches of college rooms and student lockers instead of referring such matters to the police. Of course, if the educators openly acted on behalf of the police, there is strong

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147. 75 Cal. Rptr. at 222.
148. *See* text at note 182, *infra.*
149. *See* Note, 56 CORN. L. REV. 507, 513-15 (1971).
150. Mercer v. State, 450 S.W.2d 715, 721 n. 3 (Tex. Civ. App. 1970) (dissenting opinion). The record reveals these facts about the high school principal:

> Mr. Hill has a number of students (whose identities remain undisclosed) who provide "tips" to school officials as to whom may be in possession of Marijuana.
>
> Mr. Hill meets with the Austin Police Department on a weekly basis. Particularly with the Special Services Division (narcotics squad).
>
> Mr. Hill maintains lists of suspected marijuana users. In connection with maintaining such lists, Mr. Hill confers with the police agents of the Special Services Division and notifies them of students who might be using drugs.
>
> Mr. Hill considers his power to investigate possible criminal activity to be virtually unlimited (the same as parent). It is the practice of Mr. Hill to conduct "shake downs" of large groups of students when he deems it necessary.

precedent for arguing that the search should be regarded as done by law enforcement officers for law enforcement purposes.[151] But the *Moore* and *Piazzola* cases amply demonstrate how difficult it may be to pin down the respective roles and purposes of police and college officials. Moreover, because any significant police involvement would ordinarily invalidate a search by educational administrators, there would be a constant temptation to conceal the cooperative acts.

In this state of affairs, the education official is likely to be distracted from his primary education functions and he may be subject to very nasty pressure to do what he feels is illegal, improper, or distasteful. Moreover, any increase in the law enforcement character of the jobs of college or school administrators is likely to have a damaging effect on their relationships with students. Obviously, any tendency to encourage covert arrangements between police and education officials undermines the integrity of our system of justice and reduces the respect for law by the general public and particularly by students. A far more desirable conclusion would be a rejection of the *Moore* opinion and a requirement that college and school officials undertake searches only with valid warrants or under exceptional circumstances such as those that allow warrantless searches by the police.

Regulation Authorizing Search

The students in the *Moore* and *Piazzola* cases were covered by a college regulation that provided:

> The college reserves the right to enter the rooms for inspection purposes. If the administration deems it necessary the room may be searched and the occupant required to open his personal baggage and other personal material which is sealed.[152]

The scope of a search extending to "personal" and "sealed" containers would entail a very hostile intrusion. Accordingly, this regulation goes well beyond the kind of housing code regulation that was contemplated by the Supreme Court in *Camara* as justi-

151. *See* Byars v. United States, 273 U.S. 28 (1927) (joint venture); Gambino v. United States, 275 U.S. 310 (1927) (search by state officers solely on behalf of federal prosecution); *cf.* Keene v. Rodgers, 316 F. Supp. 217, 220 (D. Maine 1970); Stapleton v. Superior Court, 70 Cal. 2d 97, 73 Cal. Rptr. 575, 447 P.2d 967 (1968); Annot., 36 A.L.R.3d 553, 590-599 (1970). *But see* Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Court*, 43 MINN. L. REV. 1083, 1171-77 (1959).

152. 284 F. Supp. at 728. *See also* Gordon v. Riker, No. C-426-71, 3 COLLEGE LAW BULLETIN 101, (Fla. 8th Jud. Cir. 1971), in which a college student's suit attacking a housing contract was voluntarily dismissed after the university agreed to strike a sentence which provided, "Authorized University personnel may enter student rooms for inspection, maintenance, housekeeping and conduct purposes."

fying the issuance of a warrant to make a search that would be not "personal in nature" and consequently regarded as a "relatively limited invasion" of privacy.

It is difficult to know to what extent Judge Johnson found independent support in the regulation and to what extent he was simply responding to the fact that the student challenged the regulation, "facially and as applied." It does seem that the court's opinion wavered between emphasis on the regulation as "reasonable" and minimization of the regulation's significance. The court said the regulation would be "presumed facially reasonable" if

> the regulation—*or in the absence of a regulation, the action of the college authorities*—is necessary in aid of the basic responsibility of the institution regarding discipline and the maintenance of an "educational atmosphere."[153]

It is very clear that Judge Johnson did not accept the validity of the search simply because the regulation said the search could be made. If the regulation were taken literally, a college room could be searched whenever the administration "deems it necessary." But the court clearly rejected any such absolute authority on the part of college officials. Instead, Judge Johnson limited the operation of the regulation by a constitutional standard requiring the college official to have a reasonable belief that the room was being used in a way which would have a serious adverse effect on campus discipline.

The existence of a regulation also seems to have influenced the court's reasoning in *Overton*.

> The students at Mount Vernon are well aware that the school authorities possess the combinations of their lockers. It appears understood that the lock and the combination are provided in order that each student may have exclusive possession of the locker vis-a-vis other students, but the student does not have such exclusivity over the locker as against the school authorities. In fact, *the school issues regulations regarding what may and may not be kept in the lockers* and presumably can spot check to insure compliance. The vice-principal testified that he had, on occasion, inspected the lockers of students.[154]

Unlike the regulation in *Moore*, the one referred to here deals with *use* of the locker and does not, at least directly, authorize a search of any kind. The fact that school authorities possessed a key or a combination to the lockers does not prove that they had any power to search, whether for any particular purpose or under any parti-

153. 284 F. Supp. at 729.
154. 20 N.Y.2d at 362-63, 283 N.Y.S.2d at 25.

cular set of circumstances. After all, the school custodian as well as the vice-principal had a master key. Certainly the fact that the vice-principal had inspected in the past does not insure the legality either of those past searches or of possibly different future searches. It hardly seems convincing for the court to argue that, because there were regulations regarding what could be kept in the lockers, the school "presumably can spot check to insure compliance." There are laws regulating what people everywhere may possess, but this does not lead to the conclusion that the authorities can "spot check" for compliance.

Even the court's inference that it "appears understood" that the student lacked exclusive use "as against the school authorities" does not establish a search power in general or of any particular nature. There are many levels of nonexclusivity. For example, in the fashion of the *Camara* search, the vice-principal might have had the power to make general health or neatness inspections that did not focus suspicion of a criminal or school violation on a particular student. Or the vice-principal might have had power to make only innocuous inspections focused on a particular student or small group of students, such as an inspection to detect the origin of that Limburger-cheese-like smell permeating the hall. The point to be emphasized, in short, is that the effect of a regulation governing locker use—together with related circumstances such as possession of a key—entails a question of interpretation. One must ask whether and in what precise way the regulation qualifies the student's expectation of freedom from government intrusion into his locker.

In addition to this question of fact, one must ask the more difficult question of policy: How far should a regulation be permitted to go in qualifying the student's expectation of privacy in his school locker (or in his college dormitory room)? My answer is, "Not very far," though admittedly that does not provide an overwhelmingly useful standard. Fourth Amendment rights (like other constitutional rights) would be rendered largely meaningless if they were subject to serious qualification or elimination by the terms of regulations issued by those interested in making or facilitating a search. If a police chief issued a regulation stating that all houses in a particular area would be searched if the police chief found it desirable to do so, it hardly seems likely that the courts would uphold the search. This would be true even though, in a factual sense, it is very likely the owner would not have had reasonable expectation of privacy from that search. The point is

that the expectation of privacy protected by the Fourth Amendment cannot be defined in purely factual terms. It must be defined, primarily, by determining what privacy expectations should be protected.[155]

Nor should it matter, in connection with a regulation reserving the right to make searches, that (1) the school (or college) owns the locker (or room) searched, (2) the school (or college) has no duty to provide the searched space and the student has no right to the space, or (3) the space is explicitly taken by the student subject to the regulation. As we have seen, ownership is not a controlling consideration. That the absence of a duty to provide (or right to have) a locker is irrelevant can be seen by a simple illustration. The government has no duty to provide public housing, but if it elects to provide housing it may not do so subject to the right of law enforcement officers to search whenever they choose to do so.[156] There is no right to a college education, but it is now generally accepted that such an education cannot be made available on the condition that a matriculating student forfeit certain constitutional rights.[157] Both the Fifth Circuit in *Piazzola* and Judge Johnson in *Moore* and *Piazzola* found that the student had not waived his Fourth Amendment rights by reason of the college's reserved power to search his room.[158] The *Tinker* case and the fact that students are compelled by law to attend school would seem to rule out any

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155. Compare the words of Mr. Justice Harlan in a recent dissent:

> The analysis must, in my view, transcend the search for subjective expectations or legal attribution of the assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.
>
> Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.

United States v. White, 401 U.S. 745, 786 (1971).

156. The Supreme Court's recent decision in *Wyman v. James*, 400 U.S. 309 (1971) undermines a little the confidence with which this prediction is made. *Wyman v. James* held that ADC welfare payments could be withheld from a recipient who refused home visits of a social worker. Although the Court's opinion seems offensively ungenerous as well as constitutionally objectionable, it was careful to distinguish a welfare visit from the intrusive search characteristic of a search for evidence of crime.

157. *See* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied 368 U.S. 930 (1961); Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A. L. REV. 368 (1963); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1028-32 (1969).

158. 442 F.2d at 289-90; 316 F.Supp at 628; 284 F. Supp at 729. Unfortunately, the *Moore* opinion also contains an ambiguous statement that the student lessee of a college room implicitly waives his right to object to "reasonable searches." 284 F. Supp. at 731. *See* note 173, *infra.*

possible basis for arguing that a public school student waives Fourth Amendment rights.[159]

Despite my criticism of the New York Court of Appeals for its failure in *Overton* to question very deeply the impact of the locker regulation before it, the existence of that regulation may have contributed little to the court's conclusion. I have already questioned the significance of the regulation in *Moore* to the result in that case. The effect of Judge Johnson's *Moore* and *Piazzola* opinions seems to be that—notwithstanding the search-authorizing regulation—the student does have a reasonable expectation of privacy in his college room except to the limited extent that a search by college officials is necessary for college purposes. The circumstances making such a search necessary thus would depend fundamentally on factors other than the existence of a regulation. Perhaps, though, when the question is extremely close, a regulation giving the student advance notice of a possible search may tend to swing the balance away from the student's interest in privacy. In this limited way, the expectation of privacy that a student might otherwise have may be qualified by publishing the regulation.[160] Possibly this is what Judge Johnson had in mind when he spoke of a regulation that would be "presumed facially reasonable" even though "it may infringe to some extent the outer bounds of the Fourth Amendment rights of students." But apart from this peripheral role of the regulation, the basic question in both *Moore* and *Overton* remains whether the search was "necessary" for educational purposes as the courts in those cases concluded. I will now turn to that question.

The Needs of Educational Institutions

In various ways each of the four cases that upheld the search emphasized the unique character of education as a ground of justification. In *Moore*, for example, the court stressed the existence of a special student-college relationship. The presence of a connecting link between this relationship and the search was ap-

159. *Cf.* Piazzola v. Watkins, 442 F.2d 284, 290-91 (5th Cir., 1971). It should make no difference whether the form of the waiver is by implication, by explicit contract, or by a transfer of a limited property interest. *See* Comment, 17 U. KANS. L. REV. 512, 527 (1969). *But see* Knowles, *Crime Investigation in the Schools: Its Constitutional Dimension*, 4 J. FAMILY LAW 151, 164 n. 40 (1964).

160. It is also arguable that the existence of a regulation tends to provide evidence that the search was conducted for the permitted purpose authorized by the regulation rather than for some other, improper purpose. *See* United States v. Miller, 261 F. Supp. 442, 449 (D. 1966). Whether such a theory is valid seems debatable, since it seems to depend on a presumption of regularity on the part of the searching official. And the theory would seem to be especially weak where the regulation was not drawn in a way that would narrowly and specifically limit the search conducted.

parently the critical factor that led the court to approve of the search in *Moore*, and the absence of such a connection led the court to invalidate the search in *Piazzola*. Unfortunately, in each case the importance of the student-college relationship was largely left to speak for itself without further explanation from the court. According to Judge Johnson, the special relationship clearly means that the college has a special responsibility to maintain discipline and an educational atmosphere. But the court did not define this special responsibility in a way that would explain why the maintenance of discipline in a college is more important or entitled to more indulgence in applying the Fourth Amendment than is enforcement of the criminal law. Conversely, the court said nothing at all to explain why the student's special relationship with his college should result in his receiving a lower level of protection than a suspected criminal or, perhaps more accurately, a suspected criminal who is not also a student.

In its emphasis on maintaining discipline and promoting an "environment consistent with the educational process," the *Moore* court relied partly on the authority of *People v. Overton*. In the following language, the first opinion of the New York Court of Appeals in *Overton* elaborated on the reasons for stressing the educational relationship:

> The power of Dr. Panitz [the vice-principal of the school] to give his consent to this search arises out of the distinct relationship between school authorities and students. The school authorities have an obligation to maintain discipline over the students. It is recognized that, when large numbers of teenagers are gathered together in such an environment, their inexperience and lack of mature judgment can often create hazards to each other. Parents, who surrender their children to this type of environment, in order that they may continue developing both intellectually and socially, have a right to expect certain safeguards.
> It is in the high school years particularly that parents are justifiably concerned that their children not become accustomed to anti-social behavior, such as the use of illegal drugs. The susceptibility to suggestion of students of high school age increases the danger. Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps if the charge is substantiated.[161]

Although this statement raises various troublesome questions,[162]

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161. 20 N.Y.2d 362, 283 N.Y.S.2d at 24-25.

162. For example, this explanation does not clearly state whether the activity's illegality, its antisocial dimension, or both, are crucial to the authorities' "affirmative obligation to investigate." Nor did the court indicate the extent of the investigation that would be permissible, the nature of "appropriate steps" or the standard or procedures for substantiating charges.

the general picture it paints is clear enough: parents "surrender"[163] their children to schools; children, collectively, may create a menace to one another; parents[164] have certain rights to have their children protected; consequently, educational administrators must maintain discipline, which includes investigation for illegal drugs to protect the other children from becoming "accustomed to anti-social behavior." With relatively slight modifications to account for differences in the ages of the students and perhaps the absence of comparable parental control, this picture could also reflect the circumstances of *Moore*. It seems fairly clear that this concern for the safety and welfare of the "other students" stands at the heart of *Moore*, and this concern was expressly emphasized in both *Stein*[165] and *Donaldson*[166] as well.

Particularly at the high school level, where attendance is legally compelled, this concern seems entirely justified. But even at the college level the need for an education places students under great practical pressure to attend. And at both the high school and college levels, these legal, social and economic pressures do result in bringing very large numbers of students into proximity with one another. Because, practically speaking, the coming together of many students is not voluntary, it is especially important that these students not be victimized by conditions prevailing at their educational institutions. Furthermore, the purpose of inducing the students to come together is to enable them to engage in academic activity, and this purpose might be frustrated by their exposure to certain dangers.

What seems to be singularly lacking in either *Moore* or *Overton* (or in *Stein* or *Donaldson)* is any comparable concern for the student who is charged with wrongdoing or for the interest in privacy that he champions in his own self-interest. He, too, needs an education and, below college, is compelled by law to attend school. Students have a strong interest in privacy in school lockers and college rooms. Yet there is no recognition in the *Overton* statement quoted earlier that the parents of the suspected students, no less than other parents, "surrendered" their children to the school. In *Moore*, the court clearly assumed that the student's special rela-

163. The accuracy of "surrender" in a system of compulsory education is, of course, questionable.

164. In the court's view, it is the parents, not the students, who have the rights.

165. *State v. Stein* mentioned the preservation of "the welfare of student bodies" and quoted approvingly the first paragraph of the *Overton* excerpt set out in the text. 456 P.2d at 3.

166. *In re Donaldson* heavily stressed the danger of drugs to other students in the school. 75 Cal. Rptr. at 222.

tionship with his college means only that his constitutional rights are diminished if he is unfortunate enough to have a privacy interest that is at odds with the college's interest in making a search.

It appears that the interest in privacy is given a low value in these cases as a result of an undue concentration on the student against whom a particular search produced evidence of prohibited conduct. It is utterly misleading to contrast the accused and "other" students. The privacy protected by the Fourth Amendment is not reserved for criminal suspects or for those who violate school or college regulations. All students while in school or college have a stake in preserving a modicum of privacy against the interference of the police and also from teachers, administrators, and other students. But, as in the criminal law generally, only the person put in serious jeopardy by a search is likely to have a sufficiently strong interest to challenge the legality of the search. The student prosecuted, however, is not the only student searched. Moreover, it is obvious that searches are conducted on the basis of suspicion, whether well or poorly grounded. Plainly, not all suspicions turn out to have been correct. As the barriers against unreasonable searches go down, the privacy of all students is sacrificed. The resulting state of affairs is forcefully described by the succinct conclusion of the Fifth Circuit Court of Appeals in the *Piazzola* case:

> the search was an unconstitutional invasion of the privacy both of these appellees and of the students in whose rooms no evidence of marijuana was found.[167]

Although the court here was referring to a police search, a search by college or school officials would similarly tend to invade the privacy of all students who are searched, whether or not it turns out that they have engaged in any wrongdoing.

In his *Moore* opinion, Judge Johnson adopted a test, the heart of which seems well calculated to provide a basis for balancing the individual student's privacy interest against the educational institution's interest in law enforcement. According to this test, the critical question is whether a dormitory room is used in a way that would "seriously interfere with campus discipline." Unfortunately, the application of this test seems to have failed to result in the desirable balancing for two reasons.

First, the court assumed without analysis that "using a dormitory room for a purpose which is illegal" would always constitute

167. 442 F.2d at 290.

a serious interference with campus discipline. The problem is that schools and colleges are not uniquely affected, as educational institutions, by each and every violation of law. A determination that there is such a special effect requires an examination of the particular violation in the particular circumstances. Whether a narcotics violation by a student peculiarly affects interests of an educational institution might depend on such factors as whether a school or college is involved, what narcotic substance is involved, whether the offense is possession or sale, and—if a sale—whether the quantity involved is large or small or whether the circumstances suggested a casual transfer or a professional operation. The relevance of such factors is, naturally, something over which reasonable men might differ. Nevertheless, it does seem clear that one student possessing one marijuana joint in the privacy of his room does not obviously and inevitably pose a serious threat to the educational institution. Whether such a threat exists must be examined and not simply assumed.

The second shortcoming in the application of Judge Johnson's test in *Moore* is the failure to require a warrant.[168] Assuming an appropriate determination has been made that the educational institution has an interest independently affected by a particular criminal violation, that interest would not necessarily be jeopardized by requiring a warrant. On the contrary, it would seem that the requirement of obtaining a search warrant from a neutral judicial officer in the absence of "emergency" or other special circumstances would tend to achieve some balance between the competing interests of the student and the school or college. None of the courts in these cases directly discussed the justification for not obtaining a warrant, nor suggested that the warrant requirement would have placed a special burden of any kind upon the administration of the educational institutions involved. There is no indication in any of the locker or dormitory room cases that obtaining a warrant would have jeopardized the safety or welfare of any students in any way.

An argument was advanced in this direction, however, in the case of *In re G.*, one of the pocket-search cases discussed earlier.

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168. It is quite likely that issuing warrants for administrative searches of school lockers or college dormitory rooms does not fit neatly within existing practices or statutory procedures. What is essential is the intervention of a judicial officer, and it may be that some other form of authorizing order would have to be substituted for a warrant. But, in any event, existing practices and statutes can be modified as appropriate; they would not justify warrantless searches where the intervention of a magistrate is constitutionally required to make a search reasonable.

If a warrant had been obtained (or a formal arrest made), the court said,

> little imagination is needed to visualize the adverse effect of such full blown criminal procedures on the school's discipline generally.[169]

Instead of obtaining a warrant or making an arrest, the dean of students, acting on the information provided by a student informer, "asked" the student defendant to accompany him to the dean's office and there to empty the contents of his pockets. For this, the court had praise:

> Without the intervention of law enforcement officers and with little or no disruption of school activities or discipline, they conducted an informal investigation of the reported matter. Their information may or may not have proved to be valid, but their action insured that the adverse effect on the student's well-being, on his present and future emotional reaction to the event, as well as on the several societal interests concerned, would be kept at a minimum.[170]

Exactly what the court meant by "disruption of school activities or discipline" is not clear. This apparently means that obtaining a warrant would be administratively inconvenient. While no doubt the school has an interest in avoiding such inconvenience, it seems an interest of low magnitude when weighed against the student's interest in securing the privacy protection of the constitution. It is always a nuisance for law enforcement officers to take the trouble to get a warrant.

The *In re G.* opinion may also be read to contain the oblique suggestion that school officials might ignore evidence of crime rather than accept the burdens of obtaining warrants. It seems inevitable that this would happen in some degree as it is a cost to society of providing any constitutional safeguards that increase the burden of law enforcement. But the problem is not unique to school or college officials. If the nature of our schools and colleges heightens the likelihood of crime or the importance of crime prevention, we should be prepared either to provide the personnel and facilities necessary to that task or to change the nature of our educational institutions. We should not force students into such institutions and then blithely remove constitutional safeguards they would otherwise enjoy.

The main emphasis of the passage quoted from the *G.* case is the impact of the warrant procedure on the searched student himself. The court argues, in effect, that the student's interests receive

169. 11 Cal. App. 3d at 1197, 90 Cal. Rptr. at 363.
170. *Id.*

less rather than more protection if a warrant is required. That sort of self-serving assertion must always be greeted with profound suspicion. In the first place, the court's argument implicitly assumes either that the school's and the student's interests are never in conflict or that, if there were a conflict, the school officials would act in the student's interest rather than the school's. There is no reason to believe either assumption to be correct. At the very least, the student himself should be given the opportunity, through the device of a truly voluntary consent,[171] to decide whether a warrantless search is in his own interest. Furthermore, if the court's argument is sound, it would seem to apply to all persons suspected of crime, not just to those who happen to be students in school. The court's reasoning is that such suspects are better off if warrants are eschewed because they might turn out to be innocent and then the whole matter would be more easily forgotten as a passing incident rather than as the serious event signaled by presentation of a warrant.

There are several major difficulties with the court's approach. First, being searched for evidence of a criminal violation is a serious matter that cannot and should not be lightly regarded by anyone concerned. Second, it is very doubtful whether being searched with a warrant will ordinarily have a greater impact on the subject than being searched without one. In fact, a warrantless search seems more likely to convey the impression that the searched individual—be he young or old—is helpless before the arbitrary exercise of power by those officially clothed with society's authority. Third, it seems clear that a green light to warrantless searches will stimulate searches made on weaker grounds and with greater frequency. Fourth, both those who have and those who appear to have violated laws or regulations have an obvious interest in resisting the gathering of evidence against them.

There is also a strong hint in the court's reasoning that young people are different—a hint, that is, of the idea now discredited by the *Gault* decision that young people will be better served by entrusting their freedom to the well-motivated actions of their adult superiors than by protecting them with the constitutional rights afforded adult members of society.[172]

If the arguments articulated by the court in the *In re G.* case lie silently behind the conclusions in the cases discussed in this paper, my belief is even stronger that the warrant requirement should be

171. *See* pages 65-67, *infra.*
172. *See* text at notes 49-52.

imposed upon administrative searches by school and college officials.

Superior's Authority over Discipline and Security

The case against the student in *Moore* ends with what purports to be an alternative holding. Apart from the other reasons given, the opinion states that the student's objection to the search of his dormitory room is conclusively answered by a "settled" line of cases involving searches by a "superior charged with a responsibility of maintaining discipline and order or maintaining security."[173] This alternative approach to the case has the aura of an afterthought.[174] It certainly is given very little emphasis by Judge Johnson.

The four cases[175] on which the court relied unmistakably support the proposition that, in some circumstances, a "superior" responsible for discipline or security may make searches that would otherwise be unconstitutional. But it seems extremely doubtful whether the justifying circumstances of those cases can be transferred to an educational institution. Two of the four cases involve searches by military authorities of persons subject to military

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173. 284 F. Supp. at 730-31. The statements immediately preceding and following the language quoted in the text are at first confusing. The court introduced the quoted language with the statement, "Assuming that the Fourth Amendment applied to college discipline proceedings," 284 F. Supp. at 730, yet the opinion had, it seemed, clearly assumed all along that the Fourth Amendment "applied." The question was *how* it applied.

Following the language in the text the court said that a dormitory student waived objection to reasonable searches. But the concept of a student dormitory tenant waiving objection to a reasonable search is both conceptually meaningless and seemingly inconsistent with the court's earlier analysis. "Reasonable" searches are not proscribed by the Fourth Amendment, so waiving objection to them is not necessary. Moreover, the court had earlier rejected any suggestion that the student could be compelled to waive a constitutional right as a condition of entry to college. Now the court seems to be saying that such a waiver is effected as a condition of entry into the college's dormitory (which itself, in many cases, is either practically or legally required of students seeking admission, *see* Gordon v. Riker, No. C. 426-71, 3 COLLEGE LAW BULLETIN 101 (Fla. 8th Jud. Cir. Apr. 15, 1971)).

I construe these two somewhat ambiguous statements to mean something like the following: Apart from any special application of the Fourth Amendment to a student-college context, a student who is also a lessee of dormitory space from a college must be assumed to understand that his room might be searched by college authorities who, in a sense, are "superior" officers charged with the security and discipline of the college dormitory.

174. This alternative ground might be considered as a part of the criminal-administrative distinction also relied on by the court and discussed earlier. See pp. 38-41, *supra*.

175. United States v. Collins, 349 F.2d 863 (2d Cir. 1965); United States v. Grisby, 335 F.2d 652 (4th Cir. 1964); United States v. Donato, 269 F. Supp. 921 (D. D. Penn.), *aff'd.* 379 F.2d 288 (3rd Cir. 1967); United States v. Miller, 261 F. Supp. 442 (D. Del. 1966). *See also* United States v. Crowley, 9 F.2d 927 (N.D. Ga. 1922). *See generally* Bible, *The College Dormitory Student and the Fourth Amendment: A Sham or a Safeguard?* 4 U. SAN FRAN. L. REV. 49, 57-58 (1969); Comment, 17 U. KANS. L. REV. 512, 524-26 (1969).

law.[176] As the opinions in those cases clearly reveal, the Fourth Amendment is applied under military law or in a military context in a unique and qualified fashion.[177] Moreover, considerations peculiar to the military so dominate such cases that they provide very shaky analogues for application to civilian law.[178] In addition, in one of the two military cases the existence of probable cause was not challenged and a commanding officer was held to have performed the role of magistrate in authorizing the search.[179]

The other two cases deal with the search of a locker of an employee of the United States Mint[180] and the search of a jacket of a United States Customs House employee.[181] It does not seem very bold to assert that these two situations also present quite extraordinary security needs. In the Customs House case, in addition, there was remarkably strong evidence suggesting that the defendant had stolen $152,000 worth of jewels from customs and there was also an apparent need to act rapidly to recover them. Furthermore, the Customs House case was decided before *Camara*, and the United States Mint case was undoubtedly argued, briefed, and the opinion written too early to be influenced by the *Camara* decision.[182] Finally, both cases were influenced by a distinction between public and private property that has been subsequently rejected by the Supreme Court in *Katz v. United States*.[183]

It simply does not seem proper to conclude that a student in college (or school) should be subjected to the kind of authoritative discipline that may well be appropriate for a soldier on military duty. Similarly, neither a college nor a school has the kind of

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176. United States v. Grisby and United States v. Miller, note 175, *supra*.

177. *See* United States v. Grisby, 335 F.2d at 654-55; United States v. Miller, 261 F. Supp. at 445, 449.

178. A fifth case, cited as "compare" by the *Moore* court, held the search in question unreasonable because civilians living overseas on a military compound are not subject to military law. Saylor v. United States, 374 F.2d 894 (Ct. of Claims 1967). *See also* Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966). A case decided since *Moore*, Biehunik v. Felicetta, 441 F.2d 228 (2d Cir. 1971), has applied a military law-type analysis in upholding a "seizure" (line up) of policemen by the police commissioner for the purpose of investigating allegedly improper behavior by police officers while on duty. *Cf.* Keene v. Rodgers, 316 F. Supp. 217 (D. Maine 1970) (maritime academy); United States v. Coles, 302 F. Supp. 99 (D. Maine 1969) (job corps center).

179. *See* United States v. Grisby, 335 F.2d at 655.

180. United States v. Donato, note 175, *supra*.

181. United States v. Collins, note 175, *supra*.

182. *Camara* was decided on June 5, 1967, and the United States Mint case *(Donato)* on June 30, 1967.

183. *See* United States v. Collins, 349 F.2d at 868; United States v. Donato, 261 F. Supp. at 923-24. *Donato* also relied on a regulation stating that the searched locker was not private and that it was subject to inspection. If *Donato* is correct, it is not because of the regulation but because persons employed at the United States Mint ought reasonably to expect the need for surveillance growing out of the peculiar work involved.

overriding interest in preventing theft that would excuse watching students through peepholes.[184] Only a very cynical view—one that sees school or college as not different from jail or the army—would support such a comparison. There is little reason to believe that this is the view the courts project in talking of the special relationship of a student to his educational institution.[185]

CONSENT TO A SEARCH BY POLICE

In four of the cases (*Piazzola, Moore, Stein,* and *Overton),* the police either made or participated in the search. In each case it was claimed that the police involvement in the search was made with the consent of a school or college official empowered to give that consent. In *Piazzola* alone was this contention clearly rejected. The *Stein* and *Overton* courts held that the education official's consent was valid. The *Moore* opinion seemed to rely on the college administrator's consent as part of the justification for participation by the police in the search of student rooms. Read with the hindsight of Judge Johnson's subsequent *Piazzola* opinion, however, it appears that the rationale of *Moore* is that the search was made by college officials for college purposes and that the presence of law enforcement officers was purely coincidental. In the *Stein* case the court held in the alternative that the student himself had validly consented to the search of his locker.

Administrative Consent—Power

In determining whether the educational administrator may consent to a search by the police, the problem is still one of balancing the interest of the student in being free from governmental invasions of privacy and the interest in law enforcement. Now, of course, the law enforcement interest clearly means enforcing the criminal law; there is no longer any question of serving exclusively educational purposes. For this reason, and because the police are now the primary actors, it is possible to argue that the threat to the student's interest is greater and the special interest in carrying out the search is less. Whether or not such an argument is sound, certainly the factors that contribute to the balancing are in some way different when educational purposes are not in the forefront.

I earlier stated my position that an administrative search by an educator that has focused on a suspected infraction of a law or

184. *See* United States v. Collins, 349 F.2d at 866.
185. *Cf.* Breen v. Kahl, 296 F. Supp. 702, 707-08 (W. D. Wisc. 1969), *aff'd,* 419 F.2d 1034 (7th Cir. 1969).

regulation for which the student suspect is threatened with serious sanctions cannot be substantially differentiated from a law enforcement search by the police. Consequently I argued that the educator ought to be limited to searches conducted with a warrant or under the special circumstances that would validate warrantless searches by law enforcement officers. I would add here the further argument that educators at all levels should not have the power to consent to searches of student rooms or lockers whether or not they have the power to make those searches themselves. This position has the virtue of clarity and simplicity. And, I believe in the long run, it will be the best rule for maintaining the integrity of both our system of justice and our system of education.

Plainly, there are other possible positions concerning the relationship between administrative search and consent powers. First, it is possible to argue that the administrative search is valid, but an administrator's consent to a search by law enforcement officers is invalid. This is the position taken by Judge Johnson in his *Moore* and *Piazzola* opinions. It is Judge Johnson's view, as we have seen, that the search by college officials in *Moore* was reasonable under the Fourth Amendment mainly because of the college's special relationship with and responsibility to its students. Applying this rationale in *Piazzola*, Judge Johnson stressed the limited nature of the college officials' interest and authority and specifically rejected the claim that the regulation authorizing college searches provided any basis for a consent to a search by the police leading directly to a criminal prosecution.

His opinion referred approvingly to *United States v. Blok*,[186] in which the court said that a government employer might have the right to inspect his employee's desk in a government office for limited purposes related to the employee's work but that the employer had no power to consent to a criminal search by the police. According to the *Blok* court,

> Operation of a government agency and enforcement of criminal law do not amalgamate to give a right of search beyond the scope of either.[187]

In affirming the *Piazzola* opinion, the Fifth Circuit Court of Appeals drew heavily on the opinion of the Superior Court of Pennsylvania in *Commonwealth v. McCloskey*.[188] The *McCloskey* case

186. 188 F.2d 1019 (D.C. Cir. 1951).
187. *Id.* at 1021; *see* United States v. Hagarty, 388 F.2d 713, 718 (7th Cir. 1968).
188. 217 Pa. Super. 432, 272 A.2d 271 (1970).

held that the consent to a police search of a dormitory room by officials of a *private* university was invalid even though the university as lessor of the room reserved the right to check for damages, wear, and unauthorized appliances.[189] For this proposition, *McCloskey* relied in turn on the Supreme Court's opinion in *Stoner v. California.*[190] In that case the Supreme Court held that a hotel clerk could not consent to a search of a guest's hotel room. The Court acknowledged that the guest might have given implied or express permission to maids, janitors, and repairmen to enter the room in the performance of their duties. "But the conduct of the night clerk and the police in the present case was of an entirely different order."[191]

The central question to be asked in applying the *Stoner* principle to locker and dormitory room searches is whether a search by an educational administrator really is of an "entirely different order" from a search by the police. I have argued that an administrative search for the purpose of finding evidence of misconduct justifying a serious noncriminal sanction is not significantly different from a police search for evidence of a crime. A somewhat more restrictive view would suggest that the similarity of administrative and law enforcement searches would vary with circumstances, depending particularly on the scope and purpose of the administrator's power to search.

For example, a room inspection by a college dean looking for an unauthorized hot plate seems slightly more serious than the entry of a maid to make the bed: but both are quite innocuous compared to a search by the same dean for evidence that would support an expulsion. Also, searches by officials of private and public educational institutions may involve significantly different implications. The administrator at the public institution, unlike his private counterpart, exercises governmental power; thus only he is clearly and directly subject to the restraints imposed by the due process clause of the Fourteenth Amendment.[192] It might be possible to conclude, therefore, that a law enforcement search by the police is of an "entirely different order" from the landlord-type search that the Pennsylvania court said the private college officials would be en-

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189. *See also* People v. Cohen, 52 Misc. 2d 366, 292 N.Y.S.2d 706 (1st Dist. Ct. Nassau Cty. 1968) (private college official's power to enter student's room could not be "fragmentized" and used as basis of consenting to police search).

190. 376 U.S. 483 (1964).

191. 376 U.S. at 489.

192. *See* O'Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155 (1970). *But cf.* 56 CORN. L. REV. 507, 513-18 (1971).

titled to make in *McCloskey*, but not from the public college official's search for marijuana that was found to be reasonable in *Moore*. This analysis suggests that the administrative search in *Moore* was *not* of an "entirely different order" from the law enforcement search in *Piazzola*, and therefore that *Piazzola* was incorrectly decided.

Despite these contrary arguments, *Piazzola* is, in my judgment, a soundly reasoned case. At least as explained in *Piazzola*, the search that led to the expulsion in *Moore* was justified precisely because it was different from a search by the police—because the college had a unique interest and a more limited purpose than the police would have had. Having made this judgment, it would have been completely inconsistent for the court in its *Piazzola* decision to have permitted the administrator's limited authority to search to provide the basis for an unlimited authority to consent. The court's reasoning plainly compelled the conclusion that the police search was of an entirely different order.

A second and quite different position on the relationship between administrative search and consent powers was taken by the New York and Kansas courts, respectively, in the *Overton* and *Stein* cases. In both cases the courts, having observed that the school administrator had certain authority to open lockers for school purposes, reasoned that this authority provided a basis for consenting to the search by law enforcement officers. It is not easy to find a rationale by which *Overton* and *Stein* can be squared with *Moore* and *Piazzola*.

Of course it is possible to distinguish the *Moore/Piazzola* and *Overton/Stein* positions on the basis of different factual settings. Under such an analysis, school lockers are different from college rooms and that is all there is to that. It is also possible that *Overton* and *Stein* proceeded on the theory that, in the circumstances of those cases, the students had no reasonable expectation of privacy in their school lockers. But any implied waiver of rights that might be derived from regulations on use of the locker and from the student's understanding that his use was nonexclusive seems especially weak as applied to the school official's consent to a police search.

Drawing a distinction between searches by school officials and law enforcement officers will not, of course, inevitably protect the student. A school official's lawful search might well produce evidence that is turned over to the police and used against the student

in criminal (or juvenile) proceedings. That is what happened in the *Donaldson* case, as well as the *In re G.* and *People v. Stewart* cases, and apparently the evidence taken in *Moore* was used in a criminal prosecution as well as in a disciplinary proceeding.[193]

Nevertheless, the question is what the student reasonably should have understood as a limitation on the privacy of his locker. It may be reasonable for the student to expect that the school vice-principal will use his power to search (and any evidence discovered thereby) discreetly and to serve educational purposes with the student's best interests in mind. If the student does reasonably expect this (or, more accurately, if he fails reasonably to expect the contrary), the student's understanding that the vice-principal might inspect his locker should not be extended to embrace a power by the vice-principal to consent to searches by the police.

Apart from these not very satisfactory explanations, there is no apparent ground for reconciliation of the *Overton* and *Stein* cases, on the one hand, and the *Moore/Piazzola* approach, on the other. The Supreme Court's decision in *Stoner* and similar cases were not mentioned in either *Overton* or *Stein*.[194] In fact, it is fair to say that neither the *Overton* nor the *Stein* opinion reveals any need to explain why an authority to search that is apparently based on the unique educational relationship provides a basis for consenting to a law enforcement search. A reading of these opinions as a whole strongly suggests the conclusion that the very considerations that justify administrative searches by school authorities also justify law enforcement searches by the police. This, of course, is directly inconsistent with the *Moore/Piazzola* reasoning. In contrast to those cases, the *Stein* and *Overton* cases seem to reach the conclusion that the unique educational purpose served by school locker searches (or an important part of it) is the protection of all students through a rigorous enforcement of the criminal law. As I will discuss shortly in the next section, this approach (particularly as applied in New York) seems to have the effect of causing what purports to be a limited educational excep-

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193. *See* text at note 146.

194. There are other third-party consent cases that are arguably inconsistent with *Stoner*, *see* Anno., 31 A.L.R. 2d 1078 (1953) & Later Case Service for volumes 25-31, at 832 (1970); *cf.* Frazier v. Cupp, 394 U.S. 731, 740 (1969), but these authorities were not used in either *Stein* or *Overton*. In the original *Overton* opinion, considerable reliance was placed on *United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966), in which the court, with Judge Smith dissenting, had upheld a third-party consent on the basis of a narrow distinction between the facts in that case and those in *Stoner v. California*. Following the remand by the Supreme Court, reliance on *Botsch* was abandoned in the second *Overton* opinion.

tion to swallow up the general rule that would otherwise provide some Fourth Amendment protection to school lockers.

A third position is possible under which an educational administrator is authorized to consent to a search by police under certain limited circumstances whether or not he himself is authorized to make an unwarranted search.[195] It may seem illogical at first to permit the administrator to consent to what he cannot do himself. This position would clearly be inappropriate if the administrator granted his consent perfunctorily. That would simply mean that the administrator had power to achieve indirectly what he was forbidden to do directly. But this third position may make sense if the college or school official were seen as performing the function of a magistrate.[196] As a stand-in for the magistrate, the education official would consent to a police search only upon a substantial showing of a need to search tantamount to the probable cause required before a warrant may be issued. The standard, of course, might be higher or it might be lower (like the "reasonable basis" standard adopted by the court in *Moore).*[197]

The basic idea behind this position runs along the following lines: conducting searches is a law enforcement function, something outside the normal sphere of an educational administrator. The police know how to conduct such searches and the schoolman does not. Furthermore, the administrator can perform his primary tasks better if he is not a part-time policeman. At the same time, there are strong educational interests that may justify searches even though a warrant is not available. But such searches should not be left to the unfettered discretion of the police. An educator may seem naturally to have a distinct interest, not clearly supportive of or antagonistic to either student or police. While acting in a magistrate-like capacity is also outside his normal educational sphere, it is not so far outside as playing policeman would be, and filling such a role is not so inherently likely to compromise his performance of his primary function as an educator.

Needless to say, this third position contains some serious weak

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195. It is important to remember that the administrator's lack of search power might be based on state or local law or on his conditions of employment rather than on constitutional judgments.

196. *Cf.* United States v. Grisby, 335 F.2d 652, 655 (4th Cir. 1964); Joint Statement on Rights and Freedoms of Students, 54 A.A.U.P. Bulletin 258, 261, (Section VI. B. 1) (1968).

197. It seems very likely that Judge Johnson did base his *Moore* decision on the assumption that the college administrator had made an independent judgment that the search should be made. Of course, *Piazzola* tells us that the *Moore* search was an administrative search rather than a consent.

nesses. First, it is based on an assumption that may be extremely unrealistic in most cases. To be equal to the demands of the magistrate's role, the school or college administrator would have to view himself in a truly neutral position, standing between student and police, and he would have to be so viewed by others. In fact, as the cases suggest, the administrator's predispositions are likely to be strongly in harmony with the law enforcement officers. Furthermore, apart from his own inclinations, the administrator will likely be under strenuous pressure to defer to the law enforcement interest. To be sure, not all magistrates are models of disinterested fairness either. But the magistrate is a judicial officer and is likely to have the sense of independence that his status offers. Moreover, the essential nature of the magistrate's position, his training, and his experience all tend to reinforce a stance of neutrality and objectivity. The educational administrator, on the other hand, is not trained or experienced in making such detached judgments. His position is in no way insulated from public or employer pressure. The possible criticism of any resistance to the police is likely to come from the very community and employment sources that may also influence important decisions affecting the educator, such as salary, tenure, or promotion.

The second weakness is indicated by the question whether there really is any need for putting an educational administrator in the position of a quasi-magistrate for purposes of consenting to a school locker or college room search. It seems clearly desirable to require a judicial judgment by a real magistrate whenever possible. If a genuine emergency exists, so that it is not possible to obtain the judgment of a magistrate, the police may conduct a search without either a warrant or consent. Thus the need for an educator-magistrate's consent would seem to arise only in a kind of no-man's-land situation in which obtaining a warrant was for some reason impracticable, a search was desirable, but a clear-cut emergency did not exist. That such situations would arise with any frequency seems doubtful. It seems clear, furthermore, that establishing the existence of such circumstances would entail the making of very fine distinctions by all concerned—the law enforcement officer seeking consent, the educator called upon to substitute for the magistrate, and the reviewing court determining the validity of the consent if it is subsequently challenged. In addition, a rule of law authorizing this in-between consent practice would tend to invite the police, possibly supported by the substitute magistrate, to disregard the warrant procedure and to gamble that the search

would be upheld either as an emergency search or on the basis of the educator's consent.

Despite these impressive weaknesses, there is a strong case for imposing the magistrate's duty upon a school or college administrator *if* the law develops in such a way as to permit warrants to be dispensed with in connection with school locker or college room searches under circumstances otherwise prohibiting warrantless searches. A regular magistrate is far preferable to an education substitute. But if the choice is between no magistrate and a surrogate magistrate, it may be reasonable to opt for the latter. If this third position were adopted by the courts, it would seem highly desirable for educational institutions to identify clearly the official who will perform this function and to attempt to create his duties in such a way as to minimize conflicts of interest for him. In determining the validity of the consent given by this official, the courts would presumably take into account any evidence tending to establish the official's independence or lack of it under the circumstances of the particular case.

Administrative Consent—Voluntariness

Once it is decided that an educational administrator has power to consent to a search by law enforcement officers, the next question is whether the consent was given and, in particular, whether it was given voluntarily. Of the school and college cases considered here, only in the *Overton* case was the voluntariness of the education official's consent challenged.

The *Overton* case had been remanded[198] to the New York courts by the United States Supreme Court in the light of *Bumper v. North Carolina.*[199] In *Bumper,* as in *Overton,* a search warrant was presented at the time the search was conducted but was not subsequently relied on as justification for the search. Reasoning that the claim of authority to search under a warrant is tantamount to an announcement that "the occupant has no right to resist the search," the Supreme Court concluded in the *Bumper* case that "the situation is instinct with coercion."[200] Therefore, the Court held in *Bumper* that the defendant's grandmother, who had permitted a search of the defendant's room in her house after being presented with a warrant, had not given a valid "consent."

On the remand of the *Overton* case to the New York Court of

198. 393 U.S. 85 (1968).
199. 391 U.S. 543 (1968).
200. 391 U.S. at 550.

Appeals, three dissenters thought the reasoning and holding of *Bumper* were controlling,[201] but the four-man majority concluded otherwise. Conceding that a literal application of *Bumper* would demand a contrary conclusion, the majority found special circumstances to support its original determination that a valid consent for the search had been given.

> Coercion is absent in this setting, having been displaced by the performance of a delegated duty. While we did state in our prior opinion that Dr. Panitz [the vice-principal] was empowered to consent to the search, in retrospect, it should be noted that this consent was equated to a nondelegable duty, which had to be performed to sustain the public trust. Contrasting the facts in this case with those in *Bumper*, it does not require extensive analysis to conclude that the "situation instinct with coercion" which characterized the plight of Bumper's 66-year-old grandmother cannot be discerned where we find a public official performing a delegated duty by permitting an inspection of public property.[202]

To focus too narrowly on these particular words would perhaps distort somewhat the court's overall position. It is probably important to recall that the court's thinking also seems to have been influenced by the school's property interest in the locker[203] and by something akin to a waiver of rights by the student in using a locker for which he knew the school authorities retained a key.[204] Still, the question squarely presented by the Supreme Court's remand was the voluntariness of the vice-principal's consent. That question is obviously not answered by noting that the school owned the locker and retained certain rights of inspection in it.

Unfortunately, it is far from easy to understand the answer the New York court does give. Possibly its opinion can be read to mean, simply, that the vice-principal's consent was given in response to his duty, *not* in response to the warrant. There are at least three difficulties with this reading, however. First, the court very plainly did not say this in a direct and straightforward fashion; yet if that was the court's intention, it would have been an easy and obvious thing to say. Second, there was at least some evidence that the vice-principal had in fact been influenced by the warrant in consenting to the search;[205] at best, the evidence was

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201. *See* 24 N.Y.2d at 526, 527, 301 N.Y.S.2d at 482, 483.
202. 24 N.Y.2d at 526, 301 N.Y.S.2d at 482.
203. *See* text at note 109.
204. *See* text at note 154.
205. *See* 24 N.Y.2d at 527, 301 N.Y.S.2d at 483 (dissenting opinion); 20 N.Y.2d at 364, 283 N.Y.S.2d at 25-26 (dissenting opinion).

ambiguous. No doubt this second factor would tend to explain the preceding one.

Third, even assuming the controlling importance of the vice-principal's duty, the basic question of voluntariness remains and the importance of the invalid warrant is not necessarily eliminated. If the vice-principal had a duty to inspect lockers under certain circumstances and a concomitant power to consent to searches by the police, it still must be determined whether the power to consent was *voluntarily exercised.* To do this, of course, requires returning to the question whether the vice-principal exercised his power partly as a result of having been presented with a warrant that turned out to be invalid. If his consent was partly prompted by the warrant, the *Bumper* case seems to say conclusively that the consent would not justify the search.

Alternatively, the New York court may have been saying, as I believe it was, that the vice-principal's duty *required* him to permit the police search. Only this construction would avoid the controlling significance of the invalid warrant. Escaping the problem of the warrant in this way, however, seems merely to return the court along another path to the fundamental obstacle of the *Bumper* case. For equating the vice-principal's nondelegable duty to his consent does not successfully avoid the *Bumper* rationale.

The Supreme Court indicated that a consent could be voluntary —and valid—only if the person giving it believed that a choice between permitting and resisting the search was possible. If the vice-principal was duty-bound to permit the locker search, he had no such choice. This situation would seem to present the same kind of "colorably lawful coercion" that the Supreme Court attributed to the ineffective search warrant in *Bumper.*[206] The only difference is that the coercion was supplied by the New York court-created duty rather than by the warrant. It is clear, of course, that the federal Constitution is the source of the supreme law of the land and may not be violated or qualified by any inconsistent state laws.[207] New York cannot abridge Fourth Amendment rights by imposing inconsistent duties to consent to searches by school officials any more than it could abridge those rights by requiring policemen to search houses suspected of containing evidence of crime.

One would assume (and hope) that some limitation on the power of the police to make locker searches in New York would result

206. 391 U.S. at 550.
207. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958).

from the fact that the duty to consent will arise only in certain limited circumstances.[208] But the *Overton* opinion provides no standards whatsoever for identifying the circumstances under which the duty is activated or restricted. In fact, the opinion contains the disturbing suggestion that the duty arises whenever there is a suspicion of a violation. Are we to assume that any suspicion, however unreasonable and whatever the evidence on which it is based, brings the duty into play? The vice-principal testified he would open the locker if there were *any charge* of improper use; the court seemed to approve of his position. If this guideline is to be applied, the police would have an unqualified right to search lockers: they would simply appear at school, state they were suspicious of a particular student, and obtain the mandated permission to search. Clearly, the Fourth Amendment was intended to take such unbridled discretion out of the hands of the police.

Even the adoption of some limiting standard would only eliminate the most outrageous consequences of imposing a duty upon a school administrator to consent to a law enforcement search. Assuming that the *power* to consent exists and that it will sometimes be exercised, it seems far preferable to give the school official discretion to consent or not in view of the circumstances of the individual case than to attempt to spell out in advance the circumstances under which the consent must be given. I have argued previously that school and college officials will ordinarily be strongly inclined to cooperate fully with police. This argument is certainly borne out by the testimony of the vice-principal in *Overton,* indicating that he had actively identified himself with the law enforcement officers. In the words of the *Bumper* case, it is unlikely the school official will frequently feel he has a "right to resist the search."

Nevertheless, there will undoubtedly be occasions when the circumstances of a request to search would properly lead a courageous school official in the exercise of his best judgment to insist on a warrant. Even if this occurs relatively infrequently, the power to decline to "consent" would seem to provide an important if limited check on the power of the police. In such a situation, the educator would act as a sort of surrogate magistrate as outlined earlier. The potentially salutary effect of placing at least a substitute magistrate between the police and the student would, of course, be

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208. *Cf.* People v. Jackson, —— App. Div.2d ——, 319 N.Y.S.2d 731 (1971), holding that a "high degree of suspicion," though short of probable cause, is sufficient to make reasonable a search of a student's person by a school administrator.

precluded whenever the school official is duty-bound to consent to police searches.

Consent by Student

In the *Stein* case, an alternative ground for upholding the reasonableness of the search was the consent of the student himself. The student's alleged consent was given to the police in the principal's office in the presence of the principal. The student argued that his consent was invalid because he had not been advised that he had a right not to consent or that evidence obtained as a result of the search could be used against him. Relying on *State v. McCarty*,[209] the court rejected these arguments and concluded that the warnings required by *Miranda v. Arizona*[210] are not required to validate Fourth Amendment consents or waivers. The *Stein* court further sought to differentiate the case before it from the circumstances of *Miranda* by stating that the student's consent was given in a

> . . . setting which is not to be equated with the aura of oppressiveness which oft pervades the precincts of a police station.[211]

Even granting the court's premise that the controlling question is whether such consents are covered by *Miranda*, the court's conclusion is not persuasive. The Supreme Court has not limited *Miranda* to police station interrogations.[212] Furthermore, many would challenge the court's view that the setting of the school, and especially the principal's office, is not oppressive.[213] But the question is not whether the full sweep of the *Miranda* decision will be applied to all consents to search as a simple matter of *stare decisis*.[214] The

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209. 199 Kan. 116, 427 P.2d 616 (1967).
210. 384 U.S. 436 (1967).
211. 199 Kan. at 119, 456 P.2d at 3.
212. *See* Orozco v. Texas, 394 U.S. (1969) (interrogation in boarding house bedroom); Mathis v. United States, 391 U.S. 1 (1968) (interrogation in state jail where defendant was incarcerated for unrelated offense). *See generally* Kamisar, *Custodial Interrogation Within the Meaning of Miranda*, in CRIMINAL LAW AND THE CONSTITUTION 335 (Institute of Continuing Legal Education 1968). As the *McCarty* case was decided immediately after *Miranda* and before *Orozco* or *Mathis*, it seems a weak precedent for deciding the consequences of a nonpolice station custodial interrogation.
213. *See* Epstein, *The Politics of School Decentralization*, NEW YORK REVIEW OF BOOKS, June 6, 1968, at 26; E. FRIEDENBERG, COMING OF AGE IN AMERICA (1963); P. GOODMAN, COMPULSORY MIS-EDUCATION (1962); ILLICH, *Commencement at the University of Puerto Rico*, NEW YORK REVIEW OF BOOKS Oct. 9, 1969, at 12: H. KOHL, 36 CHILDREN (1967); J. KOZOL, DEATH AT AN EARLY AGE (1967); G. LEONARD, EDUCATION AND ECSTASY (1968). *See also* OUR TIME IS NOW: NOTES FROM THE HIGH SCHOOL UNDERGROUND (J. Birmingham ed., Praeger 1970); HOW OLD WILL YOU BE IN 1984? (D. Diroky ed., Discus 1969); THE HIGH SCHOOL REVOLUTIONARIES (M. Libarle & T. Seligsor eds., Random House 1970).
214. Whether and just how the *Miranda* warnings will be absorbed as Fourth Amendment consent prerequisites is still an open question. *Compare* United States v. Goosbey,

question, rather, is whether the student's consent to the search was voluntary.

The courts have been extremely reluctant to infer a consent to a search that would otherwise be unreasonable under the Fourth Amendment.[215] In addition, in many recent cases the courts have recognized that failure to receive warnings before consenting to a search is one factor to be considered in determining whether the consent was voluntary.[216] The Supreme Court has noted the inherent unreliability of confessions and admissions by children.[217] And the Court has emphasized the need for extreme care in determining the validity of a waiver of both the right to remain silent and the right to counsel.[218] The language of the Supreme Court in *Miranda* itself casts grave doubt on the voluntariness of a student consent given under conditions present in *Stein*. In all settings in which an individual's "freedom of action is curtailed," the Court reasoned, there are "inherently compelling pressures" that tend to "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."[219]

The student's freedom of action is severely limited by the laws and regulations that require him to attend a particular school and to be present in a particular classroom or some other location where he is assigned to be. During the entire school day the student's every movement is subject to control. Plainly the student was not in the principal's office because he chose to be there. It is no exaggeration to say that a student compelled by law to be in school, and particularly when detained in the principal's office, is in custody in a sense relevant to the *Miranda* reasoning.[220]

As all of these factors suggest, the setting of *Stein* was not con-

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419 F.2d 818 (6th Cir. 1970); Spahr v. United States, 409 F.2d 1303 (9th Cir. 1969); United States v. Miller, 395 F.2d 116 (7th Cir. 1968) *with* United States v. Nickrasch, 367 F.2d 740, 744 (7th Cir. 1966); United States v. Fisher, F. Supp. , 9 Crim. L. Reporter 2405 (D. Minn. 7/22/71); United States v. Pelensky, 300 F. Supp. 976 (D. Vt. 1969); United States v. Moderacki, 280 F. Supp. 633, 635-36 (D. Del. 1968); United States v. Kramer Grocery Co., 418 F.2d 987 (8th Cir. 1969) (reserves judgment on question). *See* generally, Israel, *Recent Developments in the Law and Search and Seizure*, in CRIMINAL LAW AND THE CONSTITUTION 101, 130-36 (Institute of Continuing Legal Education, 1968).

215. *See* Piazzola v. Watkins, 442 F.2d 284, 289 n.3 (5th Cir., 1971) and cases cited therein.

216. *See* United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir., 1970); United States v. Caiello, 420 F.2d 471 (2d Cir., 1969), *cert. denied*, 397 U.S. 1039 (1970); Rosenthal v. Henderson, 389 F.2d 514, 516 (6th Cir. 1968).

217. *In re* Gault, 387 U.S. 1, 45-48, 52; Gallegos v. Colorado, 370 U.S. 49 (1962).

218. *Id.* at 41-42, 55.

219. 384 U.S. at 467.

220. *But see* People v. Stewart, 63 Misc. 2d 601, 603, 313 N.Y.S.2d 253, 256 (Crim. Ct. 1970) (dictum).

ducive to a voluntary consent by the student defendant. It seems clear that the failure to advise a student of his "right to resist the search" and of the possible effect of the search may have some bearing on whether his consent was voluntary in any meaningful sense. That failure takes on very great weight when the consent is given by the student to the police in the principal's office with the principal looking on. It would seem, as a minimum, that the student should ordinarily be advised of his right to insist on a search warrant and of the possible use of evidence against him.[220a] Even with such a warning, the student's consent should ordinarily be regarded as untrustworthy unless one of his parents is present or at least consulted before the student agrees to the search.

Exclusion of Evidence

In all five cases considered here, the student was attempting to exclude evidence he claimed had been obtained as a result of a search in violation of the Fourth Amendment. When a constitutionally forbidden search is conducted by the police and the resultingevidence is offered in a criminal proceeding, it is clearly established that the evidence obtained through the illegal search must be excluded from the case against the defendant.[221] The decision in *Piazzola* that the evidence found in the illegal search of the students' rooms should not have been admitted is a classic illustration of this exclusionary rule.

None of the other cases reached the question of exclusion because the challenged searches were found to be reasonable. As in *Piazzola*, the exclusionary rule would clearly have prevented introduction of the evidence obtained by the police in *Overton* or *Stein*.[222] had either search been unreasonable. But the *Moore* and *Donaldson* cases would have raised more difficult questions of exclusion. When the evidence results from an unreasonable administrative search or is offered in an administrative proceeding, application of the exclusionary rule seems to be an unsettled question.[223] Although evidence has sometimes been excluded in these

220a. *See* Knowles, *Crime Investigation in the School: Its Constitutional Dimensions*, 4 J. FAM. L. 151, 154, 163 (1964); *cf.* Rosenthal v. Henderson, 389 F.2d 514, 516 (6th Cir. 1968); United States v. Moderacki, 280 F. Supp. 633, 636 (D. Del. 1968).

221. Mapp v. Ohio, 367 U.S. 643 (1961).

222. In *Stein*, the critical evidence against the student was the contraband found in a bus station locker that was opened with a key found in the school locker. If the original search were unlawful, both the key and the contraband would be excluded. *See* Silverthorne Lumber Co., v. United States, 251 U.S. 385 (1929); Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579 (1968).

223. *See generally* Note, 53 VA. L. REV. 1314 (1967). The question of exclusion of evidence was not reached in either *Camara v. Municipal Court*, 387 U.S. 523 (1967) or its companion case, *See v. City of Seattle*, 387 U.S. 541 (1967).

contexts by the courts,[224] in other similar situations the attempt to invoke the exclusionary rule has been rejected.[225]

The basic reason for the exclusionary rule has been to deter the police from violating Fourth Amendment rights.[226] It was concluded that alternative remedies for such violations, such as an action for damages against the law enforcement officer who carried out the unlawful search, were inadequate, and that the only effective remedy was prohibiting the use of the fruits of an unreasonable search.[227]

The case for applying the exclusionary rule in administrative proceedings or with respect to evidence gathered illegally by educational administrators would seem to depend on an assessment of two arguments. First, the need to deter violations of Fourth Amendment rights applies in these other contexts with considerable force. Second, the application of the exclusionary rule in these other contexts is needed to prevent circumvention of the rule in its primary police/criminal law setting.

In evaluating the first of these arguments, it is helpful to identify three slightly different situations: (1) evidence used in an administrative proceeding as a result of a police search; (2) evidence used in a criminal law proceeding as a result of an administrative search; (3) evidence used in an administrative proceeding as a result of an administrative search. None of the cases considered in this paper illustrates the first situation, though from the *Moore* opinion alone one might have thought it was such a case. *Donaldson* is an example of the second situation, and *Moore*, as it turns out, is an example of the third.

The first situation (police search/administrative use) seems the least important because it seems least likely to occur. On the one hand, it is arguable that exclusion is not needed because of the

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224. *See* United States v. Van Leeuwen, 414 F.2d 758 (9th Cir., 1969); Verdugo v. United States, 402 F.2d 599 (9th Cir., 1968); Saylor v. United States, 374 F.2d 894, 898, 903 (Ct. Claims, 1967); Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir., 1966); *cf.*, Colonade Catering Corp. v. United States, 397 U.S. 72 (1970) (statutory construction); One 1958 Plymouth v. Commonwealth, 380 U.S. 693 (1965) (quasi-criminal seizure). *See generally*, 48 Iowa L. Rev. 710 (1963).

225. *See* United States v. Schipani, 435 F.2d 26 (2d Cir., 1970); United States *ex rel.* Spearling v. Fitzpatrick, 426 F.2d 1161 (2d Cir., 1970); NLRB v. South Bay Daily Breeze, 415 F.2d 360 (9th Cir., 1969) (dictum).

226. *See* Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25, 41-44 (1949) (Murphy, J., dissenting); Weeks v. United States, 232 U.S. 383 (1914).

227. *See* cases, note 226, *supra*. The various alternative remedies and their defects are summarized in Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 673-74 (1970). Professor Oaks also develops a very forceful case challenging the effectiveness of the exclusionary rule.

anticipated infrequency of this type of situation. (Using the same criteria, however, one can argue for exclusion to avoid fine distinctions in the law that could be justified only if the circumstances bringing them into existence were considered important.) Also, if it is assumed that the police will produce evidence useful in administrative proceedings only as a result of searches that also (or primarily) have a criminal law enforcement purpose, it is then arguable that the criminal law ingredient will control the officers' behavior and provide as much deterrence as is needed. On the other hand, it is arguable that exclusion is needed because the deterrence provided by the exclusionary rule is not perfect under the best of circumstances; to hold out the possibility that the fruits of an illegal search can be used against a student in an administrative proceeding will tend to dilute the effectiveness of the rule still more.[228] Furthermore, searches by the police for evidence usable in administrative proceedings are not inevitably linked to criminal law enforcement searches. For example, the police might well conclude that the best way to deal with a drug problem in a particular community is by causing certain students to be expelled.

In the second situation, represented by *Donaldson*, the educator makes the search and the evidence is then turned over to the law enforcement agencies. Of course, there is no reason to think that an action for damages would be any more effective against school or college officials than against law enforcement officers. But, so the argument would run, the educational administrator would be more inclined to accept and adhere to constitutional limits without external sanction than would the policeman.[229] This argument may have some validity. But most administrative officers are strongly motivated to ferret out and eliminate violations regarded by them as threats to institutional purposes and to members of the community they are responsible for protecting. In none of the five cases discussed was there any evidence of reluctance by the educators to make the searches involved. Even if the attitudes of school administrators and policemen toward constitutional limits are different, the difference hardly seems great enough to call for a different constitutional conclusion.

The most important element added by the third situation (involving administrative searches for administrative purposes) is the

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228. Use of illegally seized evidence for sentencing rather than convicting presents a somewhat comparable question whether deterrence will be diluted. *Compare* United States v. Schipani, 435 F.2d 26 (2d Cir., 1970) *with* Verdugo v. United States, 402 F.2d 599 (9th Cir., 1968).

229. *See* SKOLNICK, JUSTICE WITHOUT TRIAL (1968).

elimination of criminal sanctions. The arguments developed earlier in this paper compel the conclusion that this is only a marginally significant distinction.[230] Administrative sanctions used against students are often extremely serious, and the intensity of the education official's search is likely to be great. Thus, the need for a deterrent in this situation is not substantially less than the need in the preceding one.

The second main argument is that the exclusionary rule should be extended to the contexts here considered to avoid erosion of the rule as applied to police searches for evidence of crime. This argument applies only to the second situation described above, that is, where an educational administrator makes the search and turns over the evidence to the police. The principal features of this argument were outlined earlier in discussing the undesirability of encouraging the police to transfer police investigatory tasks to college or school officials.[231] The argument applies even more forcefully here. In the earlier discussion, the question was whether administrative searches by educators should be treated as reasonable in circumstances where police searches would not be so treated. Here the question is whether, assuming the administrative searches are unreasonable, the evidence they produce should nonetheless be admissible.

The history of the closely analogous "silver-platter" doctrine suggests that use of evidence illegally obtained by educators and turned over to the police should not be condoned.[232] Under this doctrine evidence illegally obtained by the state police could be handed over to federal officers "on a silver platter" and used in federal courts. Noting that joint participation of state and federal officers would invalidate the doctrine and that determining the existence of such joint participation had been frustratingly difficult, the Supreme Court finally abandoned the doctrine in *Elkins v. United States*.[233] The Court said that the kind of cooperation between state and federal police that should be encouraged is

> hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom.[234]

It is sometimes said that exclusion of relevant evidence is an extraordinary remedy and should be restrictively applied. This

230. *See* page 32, *supra.*
231. *See* page 40, *supra.*
232. *See* Lustig v. United States, 338 U.S. 74, 79 (1949).
233. 364 U.S. 206 (1960).
234. *Id.* at 221-22.

is no doubt true, but it should mean that the exclusionary rule must be restricted to situations where it produces greater benefit than harm to the administration of justice. In my judgment, an assessment of the arguments in this section leads to the conclusion that the exclusionary rule should be applied to all unreasonable searches in the educational contexts considered in this paper. It may well be that the effectiveness of excluding evidence has been oversold[235] and that the exclusionary rule should be replaced by some better deterrent.[236] The arguments of this section do not, of course, suggest that such a development would be undesirable. At the present time, however, there does not appear to be such an alternative and, until there is, it would be undesirable to apply the exclusionary rule to some but not all of the locker searches designed to detect and prevent crime and closely related misconduct in school.

V. CONCLUSION

In a few concluding remarks, I want to summarize the main points I have tried to develop concerning the law of locker searches and then make a few observations about the broad values at stake in decisions on these legal principles.

My criticism of some of the decisions of the courts is not based on any novel theory of constitutional law. It relies on the application of accepted principles to somewhat different circumstances. The primary question, surely, is whether a student does indeed have a reasonable expectation of privacy in his school locker. No doubt many observers would reject the idea that the student is entitled to such privacy. Yet, as I have argued, the student does have a strong interest in privacy by reason of the conditions of school where he is required by law to be in attendance. A number of decided cases involving, variously, the Fourth Amendment, the rights of students in public school, and the rights of youth make it difficult to ignore that interest.

If the student's privacy interest is recognized, the second principal question concerns the reach of the Fourth Amendment protection to which he is entitled. I have argued that the limits of this protection should be controlled mainly by general Fourth Amendment principles, which require search warrants validly

235. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).
236. *Id.* at 754-57

issued by a judicial officer in the absence of an emergency or the like. Certainly the warrant requirement ought to apply to police searches. The decisions considered here recognize that principle. Moreover, in the *Piazzola* case the Federal District Court for the Middle District of Alabama and the United States Court of Appeals for the Fifth Circuit have given that principle meaning in connection with college room searches by refusing to acknowledge the college administrator's consent to a search by the police. By contrast, it seems to me, the New York Court in the *Overton* case (and perhaps the Kansas court in the *Stein* case) has permitted the warrant requirement to be completely undermined, first, by giving the school administrator the power to consent to locker searches by law enforcement officers and, second, by treating the consent power as a duty, thus leaving the discretion to search or not in the hands of the police.

I concede that a stronger case can be made for permitting searches by educational administrators, and such searches have thus far been uniformly accepted by the courts. I continue to believe that the administrative search power could be made subject to the warrant requirement without substantial adverse effect on legitimate educational or law enforcement interests and that the power should, in general, be accepted far more guardedly than the courts have so far seemed inclined to do.

In short, I am saying that the frustration of crime-prevention activities in school that would result from applying Fourth Amendment principles to locker searches should not be overestimated, and that the damage that can result from diluting constitutional safeguards should not be underestimated. I have already questioned the disadvantage that would result from honoring the warrant requirement. One might ask, in addition, just how effective locker searches are at crime prevention. For example, it is not clear that drug distribution (with which all the cases except *Stein* were concerned) would be significantly abated in school if frequent warrantless locker searches were generally condoned.

But that may be too detached an inquiry for dealing with such a problem as crime in school. One cannot escape the sense of a larger dimension lying behind the articulated reasons set forth in the opinions of the cases considered in this paper. Disruption, lawlessness, violence, drug abuse—perhaps all too often thoughtlessly associated and equated with one another—are perceived by increasing numbers of Americans, including judges, as societal problems affecting schools in a deeply troubling way, something

approaching a catastrophe. Given this view of American public schools, it is not surprising to find the courts reluctant to interpret legal principles in a way that might frustrate attempts to bring these evils under control. I myself confess to feeling uneasy about advocating legal positions that might give a freer hand to violence or drug distribution in school.

Yet there are powerful forces on the other side of the balance as well. History seems to have a way of reminding us that taking constitutional shortcuts does not work. That is the fundamental and most important lesson of the *Gault* decision. Edgar Z. Friedenberg has argued that dignity and privacy are not permitted to develop in American high schools [237] and that

> It is idle to talk about civil liberties to adults who were systematically taught in adolescence that they had none; and it is sheer hypocrisy to call such people freedom-loving.[238]

His argument is characteristically blunt and exaggerated. But does not Mr. Friedenberg's point give us pause? It is essentially the same point that the Supreme Court made almost thirty years ago:

> That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[239]

There is a very good chance that the greatest long-range danger to our society and its members is not crime in school but an erosion of privacy and the destruction of human values that go with privacy. There is no doubt that the existing technical capacity for invading privacy is monstrous. It would be highly desirable if the citizens of the United States who are now in school learn to value privacy, learn that the society respects it, and learn that the courts will protect it from invasion at least by unreasonable governmental searches and seizures.

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237. *See* E. Friedenberg, The Dignity of Youth and Other Atavisms 93 (Beacon Press 1965).
238. *Id.* at 187.
239. Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943).